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SHOW PROCEEDINGS AND ORDERS DATE: [11/15/88]

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SHORT TITLE: [Lipham, William A.]
VERSUS [Georgia] DATE DOCKETED: [05/12/88]
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DATE	NOTE	PROCEEDINGS & ORDERS
Apr 4 1988		Application for extension of time to file petition and order granting same until May 12, 1988 (Kennedy, April 6, 1988).
May 12 1988		Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jun 22 1988		Brief of respondent Georgia in opposition filed.
Jun 30 1988		DISTRIBUTED. September 26, 1988
Oct 3 1988		The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)
		.....
Oct 25 1988		Petition for rehearing filed.
Nov 8 1988		DISTRIBUTED. Nov. 23, 1988. (Rehearing).

EDITOR'S NOTE

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Supreme Court, U.S.
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No. 87 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

WILLIAM ANTHONY LIPHAM,

Petitioner,

- v. -

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether the prosecutor's assurance to the sentencing jury that the responsibility for petitioner's death sentence rested with him improperly minimized the jury's role and injected an arbitrary factor into the sentencing determination, in violation of the eighth and fourteenth amendments to the United States Constitution.

2. Whether petitioner's death sentence, imposed and affirmed despite the sentencer's failure to consider powerful mitigating circumstances in petitioner's background, violates the eighth and fourteenth amendments to the United States Constitution.

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II. PETITIONER'S DEATH SENTENCE, IMPOSED AND AFFIRMED DESPITE THE SENTENCER'S FAILURE TO CONSIDER POWERFUL MITIGATING CIRCUMSTANCES IN PETITIONER'S BACKGROUND, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. . . . 20

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No. 87 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

WILLIAM ANTHONY LIPHAM,

Petitioner,

- v. -

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered on February 12, 1988, which affirmed petitioner's death sentence.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported as Lipham v. State, 364 S.E.2d 840 (Ga. 1988). It is annexed as appendix A.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on February 12, 1988. On April 6, 1988, Justice Anthony Kennedy granted an extension of time in which this petition could be filed through and to May 12, 1988. Jurisdiction of this Court is invoked under U.S.C. Sec. 1257(3), petitioner asserting deprivation of his rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the eighth amendment to the United States Constitution, which provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted

and the fourteenth amendment to the United States Constitution which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also concerns provisions of the Georgia Statutes, specifically Official Code of Georgia Annotated Sections 17-10-30 and 17-10-35. These sections are annexed as Appendix B.

STATEMENT OF THE CASE

Introduction

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Georgia, entered on February 12, 1988, which affirmed petitioner's conviction, entered in the Superior Court, Coweta County, Georgia, of one count of murder, one count of rape, one count of armed robbery, one count of burglary, and his death sentence.

The charges against petitioner, William Anthony Lipham, arose out of the killing of Kate Furlow on the night of December 4, 1985, or early in the morning of December 5, 1985. Petitioner, who was twenty-one years old at the time of the crime, admitted going to Ms. Furlow's home with the intent to burglarize it. He said he was accompanied by one Ricky McCoon, who raped and shot Ms. Furlow while petitioner was searching for valuables.

The Defense

Petitioner conceded that he entered the home of Ms. Kate Furlow on December 4 or 5, 1985, with the intent to commit burglary. (T. 367). He asserted, however, that he was accompanied by one Ricky McCoon. (T. 369). Immediately after the break-in, McCoon pushed Ms. Furlow onto the bed. (T. 369). McCoon then told petitioner to search the house and see what he could find. (T. 370). During the search, petitioner heard a gunshot and rushed back to the bedroom, where he saw Ms. Furlow lying on the bed and McCoon coming out of the room. (T. 371). Both men then ran out of the house, got into McCoon's car and drove away. (T. 372).

Petitioner proceeded to gather his belongings, including a gun that he had left on the floor of the car. (T. 372). Petitioner asked McCoon to drive him to the Quail Hollow Trailer Park, where petitioner got out. (T. 373). He never saw McCoon again. (T. 377). A few days later, petitioner went to West Palm Beach, Florida. (T. 376). He stayed there with a friend, Cathy, for approximately two weeks, after which he returned to Georgia and telephoned a sheriff to say that he would turn himself in. (T. 377). Before he could do so, the sheriff, with the GBI and FBI, learned of his whereabouts and arrested him. (T. 379).

The jury found petitioner guilty on one count of murder, one count of rape, one count of burglary and one count of robbery. (T. 467-468). The jury found, in answer to a special interrogatory, that petitioner did himself kill Kate Furlow or intended to kill Kate Furlow. (T. 468).

The Sentencing Phase - Prosecutor's Opening Statement

During the opening statement, the prosecutor stated that the jury was at the phase of the proceeding where "you make the decision as to the punishment." (T. 479). He then stated:

> But how did we get to right here? You got here because the district attorney, that's me, as the agent of the State made the decision to seek the death penalty in this case. Not any of you all but by law the only person who can do that. So you didn't bring us here. No one else did. That was my decision and that's why you can choose not to impose the death penalty if you want to, for any reason or no reason whatsoever. But that decision seeking the death penalty was already made. So don't feel like it is yours and have it weigh too heavily on you because that was my decision.

(T. 479).[2]

The Presentation of Mitigating Circumstances

Petitioner presented brief testimony by Dottie Henson, a Supervisor with Troup County Department of Family and Children's Services who had been petitioner's case worker during his childhood. (T. 495). Through Ms. Henson, the defense introduced a "bag" of evidence containing records compiled by the Department of Family and Children's Services, which had custody of petitioner from age nine through age eighteen. (T. 495-497). These records of petitioner's social and psychological history were introduced into evidence as Defendant's Exhibit 3. (T. 495).

Henson testified that petitioner had been placed in the custody of the State at age nine as a neglected child. (T. 498-99). She sketched petitioner's medical history, explaining that petitioner had spent time at the State Hospital at Milledgeville and was then transferred to West Georgia Central Hospital in Columbus until he was eventually transferred to Anneewakee. (T. 499). She never explained, nor did defense counsel ask her to explain, why he was there nor what happened to him while he was there.

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[2] A few lines later in the transcript, defense counsel registered an objection, without specifying the grounds, and it remains unclear if the objection was directed at this statement. (T. 479). The trial judge, without addressing the objection, then told the prosecutor that the purpose of the opening statement was to tell the jury what he expects the evidence to show. (T. 480).

When petitioner was released from Anneewakee, Ms. Henson received a report which contained a diagnosis of petitioner's psychiatric condition. She stated that the report was contained in the records included in Defendant's Exhibit 3. (T. 500). When asked on direct examination whether or not she had an opportunity to review those records, and was therefore prepared to testify as to their contents, Henson replied: "Not in great detail. I glanced through them." (T. 500). Accordingly, Henson never testified to whatever mitigating facts might have been contained in petitioner's medical records.

Petitioner then called Denise Chambers, the Director of Medical Records at Anneewakee Incorporated who served to authenticate a box of medical records detailing petitioner's psychiatric history during the time that he had been committed to Anneewakee. (T. 505). After Chambers verified the authenticity of the documents, they were admitted into evidence as Defendant's Exhibit 4. The documents in the box consisted of seven hundred and sixty seven (767) pages of psychological records detailing petitioner's problems, which began in his childhood and continued until his release from Anneewakee. Since Chambers was merely the custodian of those records, and never purported to have read them, defense counsel never sought her testimony as to what was contained in the records. In fact, the defense never elicited testimony from anyone as to what was in petitioner's medical records.

Petitioner's final witness at the penalty phase was his wife of three years. Janie Lipham pleaded for her husband's life so that her son would have an opportunity to know his father. (T. 508). She recalled that petitioner took her to the Anneewakee Psychiatric Center for troubled teenagers, where she met a Dr. Poetter whom petitioner admired and who had had an influence on

petitioner's life. Counsel for the defense did not elicit any testimony from her as to who Dr. Poetter was or why he had an influence on petitioner's life.[3]

Arguments of Counsel

The prosecutor's closing argument at the penalty phase included the following:

> Some of you might say, why are we here. We've already determined he was guilty. We've already determined he raped, murdered and robbed and that he intended to do what was done the way it was done. Why are we here.
>
> . . . .
>
> The death penalty has been in our country for a long time. Our government has determined not only is it necessary but it should be provided, and sets out the procedures under which it may be imposed. And you are simply a part of that. That's all. That procedure started right here. You are simply one more step in the procedure.

(T. 515-16).

After admonishing the jury that only the victim and God had a right to forgive (T. 519), a statement that the court later told the jury to disregard (T. 521-22), the prosecutor concluded by telling the jurors that, compared to what Kate Furlow went through, their decision was easy. "To infer or to interfere with justice by saying that your verdict of a proper punishment for William Anthony Lipham is only a life sentence is a joke. A very sad joke." (T. 520).

Defense counsel in his closing argument alerted the jury to the fact that the story of petitioner's life was contained in his

[3] In October, 1986 Dr. Louis Poetter, founder of the Anneewakee Psychiatric Center for troubled teenagers, was indicted on 26 counts of sodomy involving patients at the facility dating back to 1971. On April 8, 1988, Dr. Poetter pled guilty to 19 counts of sodomy and one count of simple battery. "Poetter had been accused of sodomizing 14 young male patients at the center..." United Press International Wire Service (UPI), Poetter's Case May Untangle Legal Problems of Center, Apr. 9, 1988 (NEXIS, Omni File).

medical records:

> They are large records. A lot of paper work. And that's the story of the life of William Anthony Lipham...And you're going to see some things in this record that are not very pretty. But the only way he could have learned to think, and this you're going to see in those records and I ask you to look through them please because a man's life is at stake here; the only way he could get any attention was by acting up and the only way he could have learned behavior as you will see exhibited in any of those records, was while he was in State custody. So we have society's child as recorded in these records here by psychiatrists and medical doctors.

(T. 523-25) (emphasis added).

Counsel continued:

> This stack of papers sitting here, it's terrible to think this life comes down to a stack of paper work; representative of what a man was and is and might be.

(T. 528).

He concluded:

> Take these records, ladies and gentleman. Please read them through, understand them, if you can. They are the reports of psychologists and psychiatrists. Sometimes they appear to be gobbly-gook, but I think they show that throughout the course of his life there was one brief glimmer and they recognized that.

(T. 529).

The Court's Instructions at the Penalty Phase

The judge's charge to the jury, comprising seven pages of the transcript, consisted primarily of definitions of the various aggravating circumstances relied on by the State. (T. 533-36). After telling the jurors that they could consider all the evidence presented at both stages of trial, the judge made this reference to mitigating circumstances:

> You shall also consider the facts and circumstances, if any, in extenuation, mitigation, and aggravation of punishment.

> Mitigating or extenuating facts or circumstances are those which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame.

(T. 532-33). The only other mention of mitigating circumstances was in the statement that the jury could set the penalty at life imprisonment based on mitigating circumstances. (T. 536). The court also did tell the jury that it could fix the sentence at life imprisonment for any reason, or no reason. (T. 537).

The jury retired to deliberate at 11:23 a.m. (T. 539). In their possession the jurors had one copy of more than 2,500 pages of medical records, which purportedly told the life story of William Anthony Lipham. The jury finished deliberating in exactly two hours, at which time they returned to the courtroom and recommended that the petitioner be sentenced to death. (T. 542).

The jury found as aggravating circumstances that the murder was committed while the offender was engaged in the commission of rape, armed robbery, and burglary, and that the murder was outrageously wanton, vile or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim. (T. 543). The trial judge sentenced petitioner to death. (T. 548-49). The Supreme Court of Georgia vacated the finding that the murder was outrageously wanton because the jury's wording was in the disjunctive, but affirmed petitioner's death sentence based on the other aggravating factors. Lipham v. State, 364 S.E.2d at 845.

Petitioner's Medical Records - The Untold Story of His Life

Buried within the 2,500 pages of petitioner's medical records actually was the story of his life. The records reveal that petitioner was born on August 26, 1963 as the eleventh child

in a family of fourteen children. (M. 1-2)[4] His father married his mother when he was twenty six (26) and his mother was eleven (11). (M. 14). Of the twelve children born of this union (petitioner's father had twin boys by a former marriage), not one was residing with the parents on June 23, 1976, the date that petitioner sought enrollment at Anneewakee. (M. 1-2). Three of petitioner's siblings had been adopted, one was in a home, one had run away from a home, two were in a Youth Development Center and the rest had been emancipated. No one in petitioner's family has ever graduated from high school. (M. 1-2).

Both of petitioner's parents were alcoholics. (M. 7). They severely neglected petitioner when he was younger. All of the children were reportedly abused by the parents. Petitioner was removed from his parents' custody because of parental abuse and extreme neglect. (M. 14). He had "inadequate food, inadequate clothing, inadequate medical care, inadequate supervision, and no love or guidance from his parents." (M. 7). Petitioner witnessed his drunken parents fighting and saw them separate several times. He was also aware at an early age that his mother engaged in prostitution during his father's absences from the home. (M. 7).

At the time petitioner was removed from his home, he already had a very poor self-image; "he saw himself as an unimportant person not worthy of love." (M. 7). He engaged in bizarre behavior as early as age six. (M. 14). When petitioner was taken from his parents at age nine, he was first placed in the Anne Elizabeth Shepherd Home, a group home in Columbus, Georgia, where he remained from October 20, 1972, to March 7, 1975. (M.7). His

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[4] Numerals preceded by "M" refer to a few selected portions of petitioner's medical records, numbered and annexed to this petition as appendix C. The entire set of records, unnumbered and in no particular order, comprises some 2,596 pages, a stack of paper measuring eleven inches. That entire set was admitted at the penalty phase of trial and transmitted to the Supreme Court of Georgia for its review.

behavior became even worse at the home. His conduct there is best described in an addendum to his later admission application to Anneewakee:

> There were episodes of running away, stealing, cruelty to animals, fighting and antagonizing the other boys to the point they beat him severely, extremely disruptive and belligerent behavior at school which caused him to be expelled permanently, and several kinds of sexual acting out. Tony made advances to several boys and girls at the home, was caught trying to engage in sex acts with dogs, stuck his finger in the rectums of chickens, and performed oral sex on an adult male for money. Some of the boys at the home became so disgusted with Tony's irritating behavior and complete lack of regard for other people, that they held a kangaroo court, sentenced him to a beating, put him in the middle of a bed, and stood around the bed beating him with belts.

(M. 7). His social worker was very concerned about his future placement. (M. 38).

When the authorities at the home were unable to control petitioner, they requested that petitioner be moved. (M. 7). Petitioner spent from March 7, 1975 to June 11, 1975 at the Child and Adolescent Unit at Central State Hospital, and was then transferred to the Child and Adolescent Unit at West Central Georgia Regional Hospital. (M. 7). Sometime during this period, he was placed on a powerful psychoactive drug, Haldol. (M. 20). Even this medication failed to curb his aggressive, abusive and destructive behavior. (M. 22-23). His sexual misconduct continued much as before. (M. 7-8).

On October 5, 1976, slightly over a year after petitioner entered West Central Georgia Regional Hospital, a team of psychologists there decided to recommend that he be transferred to another facility. (M. 14-15). Accordingly, petitioner was transferred to Anneewakee. Petitioner's application for admission to Anneewakee, as completed by his case worker, exposed the extent of his psychosis at that early stage in his life: "Unless this child's sociopathic tendencies are redirected, he

will eventually kill someone or enrage someone else to the point of killing him," the case worker concluded. (M. 4). He was described as a child with a very poor self-concept who constantly deprecated himself. (M. 35). Petitioner was thirteen years old. (M. 1).

On December 24, 1981 petitioner was discharged from Anneewakee because funds for his support were no longer available from the State. (M. 20)(T. 503). At that time his therapists concluded that his childhood afflictions were in remission. (M. 17). The therapists acknowledged, however, that petitioner's future success was largely dependent on his continued therapeutic contact with Anneewakee, contact that petitioner never received. (M. 17). Even petitioner himself prophetically acknowledged that if not for Anneewakee, "I would be dead or in jail." (M. 19).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1) Petitioner's counsel objected during the prosecutor's argument, although it is unclear if the objection was directed at the particular statement minimizing the jury's role. (T. 479). In response to the objection, the trial judge told the prosecutor the purpose of an opening statement. (T. 480). On appeal, the Supreme Court of Georgia performed its statutory obligation to determine whether petitioner's death sentence had been imposed under passion, prejudice, or other arbitrary factor. Lipham, 364 S.E.2d at 845. That court's practice is to review the arguments of counsel at the penalty phase in considering whether an arbitrary factor was injected into the proceedings. See e.g., Ford v. State, 255 Ga. 81, 335 S.E.2d 567, 581 (1985); Hawes v. State, 240 Ga. 327, 333, 240 S.E.2d 833, 839 (1977)(death sentence set aside despite counsel's failure to object to

improper argument). Moreover, the type of argument made by the prosecutor in this case has been held by other courts to warrant vacatur of death sentences, even in the absence of an objection. See e.g., State v. Butler, 290 S.E.2d 420, 421 (S.C. 1982).

2) The Supreme Court of Georgia performed its statutorily imposed obligation of reviewing petitioner's death sentence to determine whether it was imposed under the influence of passion, prejudice or any other arbitrary factor, see O.C.G.A. § 17-10-35(c)(1), and whether the sentence was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, see O.C.G.A. § 17-10-35(c)(3). The court had before it for its review the exhibits introduced at the penalty phase, including approximately 2590 pages of medical records, as well as the information that the jury had deliberated for a total of two hours. (T. 539, 542). The court affirmed petitioner's death sentence. Lipham v. State, 364 S.E.2d at 845.

REASONS FOR GRANTING THE WRIT

I

THE PROSECUTOR'S ASSURANCE TO THE SENTENCING JURY THAT THE RESPONSIBILITY FOR PETITIONER'S DEATH SENTENCE RESTED WITH HIM IMPROPERLY MINIMIZED THE JURY'S ROLE AND INJECTED AN ARBITRARY FACTOR INTO THE SENTENCING DETERMINATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The district attorney's argument to the jury that it should not have the decision to impose a death sentence "weigh too heavily on you," since he, "as the agent of the state made the decision to seek the death penalty in this case" created an intolerable danger that the jury would in fact minimize the

importance of its role. Caldwell v. Mississippi, 472 U.S. 320, 333 (1985). The prosecutor's statement had no other conceivable purpose, nor any other likely effect, than to lessen the jury's sense of the responsibility associated with imposition of a death sentence. Whether that responsibility is shifted to the appellate court, as it was in Caldwell, or to the prosecuting attorney, as here, the reduction in the jury's sense of the importance of its own decision, which must reflect the conscience of the community, Witherspoon v. Illinois, 391 U.S. 510, 519 (1968), is incompatible with the eighth amendment.

The prosecutor's extensive and repeated statements impressing upon the jury that their decision should be easy, given his own determination that death was appropriate, were meant to, and no doubt did, reduce jurors' sense of responsibility for petitioner's sentence. The prosecutor began his opening statement to the jury at the penalty phase by telling them that this is the phase where the jury makes a decision as to the punishment. He then continued:

> But how did we get to right here? You get here because the district attorney, that's me as the agent of the state made the decision to seek the death penalty in this case. Not any of you all but by law the only person who can do that. So you didn't bring us here. No one else did. That was my decision and that's why you can choose not to impose the death penalty if you want to, for any reason or no reason whatsoever. But that decision was already made. So don't feel like it is your and have it weigh too heavily on you because that was my decision.

(T. 479) (emphasis added).

The prosecutor returned to this theme in his closing statement, expressing the sentiment that the jurors might well be questioning why they were there. He then assured them that they were simply part of the process of imposing a death sentence sanctioned by the State. He completed his argument by describing

the idea of a life sentence for petitioner as a "joke."

The cumulative effect of these arguments was to lead the jury to believe that the decision concerning the appropriateness of petitioner's death sentence had already been made by a responsible and experienced agent of the State. The arguments were calculated to lead the jury to believe that they were merely cogs in a large machine whose decision should be a foregone conclusion. Such arguments improperly minimized the jury's role in determining the appropriate sentence for petitioner.

In vacating Caldwell's death sentence, this Court explained that reference to the appeal procedures lessened the awesome responsibility of the jury in imposing the death sentence, and further explained why jurors would naturally embrace this comforting opportunity:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. [citations omitted] Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Caldwell v. Mississippi, 472 U.S. at 332-33.

In Caldwell, the alternative decision makers were justices of the state supreme court. Here, the alternative decision maker offered to the jury was the prosecutor himself. He specifically reminded the jury that he had made the decision to seek the death penalty as an agent of the state and pointedly noted that

it should not therefore weigh too heavily on them. It could hardly be clearer that his intent was to lessen the burden of imposing the death sentence carried by the jury, since the comments were directed "at the issue that this Court has described as the principal concern of our jurisprudence regarding the death penalty, the procedure by which the State imposes the death sentence.'" Caldwell v. Mississippi, 472 U.S. at 340 (quoting California v. Ramos, 463 U.S. 992, 999 (1983)). This attractive, comforting alternative is precisely what was condemned in Caldwell.

Nor did the prosecutor's statements contain such relevant, accurate, and nonmisleading information as has been held may properly be placed before a capital sentencing jury. See California v. Ramos, 463 U.S. 992 (1983). In Ramos, the information conveyed to the jury by the prosecutor was that the governor had the power to commute a life sentence without possibility of parole. The Court held that this information was accurate and nonmisleading, and was relevant in that it involved a valid penological interest. In the present case, the information related to the jury by the prosecutor, while perhaps accurate in that he does have discretion in choosing to seek a death sentence, was both irrevelant and misleading. It was irrevelant because, unlike the valid penological interest in Ramos, there is no interest whatever in relating his discretion to the jury, other than his intent to lessen the responsibility felt by the jury. In this, it is extremely similar to the issue of conveying appellate procedures to the jury condemned in Caldwell. The information was misleading in the same way that statements are improper that vouch for prosecution witnesses, see United States v. Sims, 719 F.2d 375, 377 (11th Cir. 1983), or suggest that additional evidence exists to support the result

desired by the prosecutor. See Hutchins v. Wainwright, 715 F.2d 512, 516 (11th Cir. 1983); United States v. LaBarbera, 581 F.2d 107 (5th Cir. 1978).

Federal Courts of Appeals have widely considered this type of prosecutorial argument to be improper. The Court of Appeals for the Eleventh Circuit referred to this as the "prosecutorial expertise" argument, and noted its similarity to the argument considered in Caldwell. Tucker v. Kemp, 802 F.2d 1293, 1296 (11th Cir. 1986)(en banc), cert. denied, 107 S.Ct. 1359 (1987). In Tucker, the argument was held not to be reversible error, because the prosecutor had gone on to describe why the decision was made, focusing on the individual characteristics of this crime, defense counsel had vociferously objected, and the trial judge instructed the jury that they had the sole discretion to impose death. Id. Here, the prosecutor made no follow up as to why the decision was made, the defense made only a mild undifferentiated objection, and the court issued no curative instruction whatever. If it stands uncorrected, the argument has been found to constitute an abuse that "unfairly plays upon the jury's susceptibility to credit the prosecutor's viewpoint." Brooks v. Kemp, 762 F.2d 1383, 1410 (11th Cir. 1985), vacated and remanded on other grounds, 106 S.Ct. 3325 (1986). The Court of Appeals for the Tenth Circuit found a similar argument, that the jury was the "last link" in the decision to impose the death penalty, to be improper, although not requiring reversal because it occurred during the guilt phase of the trial. Coleman v. Brown, 802 F.2d 1227, 1238 (10th Cir. 1986). Here, of course, the argument occurred during the penalty phase of the trial.

The Supreme Court of South Carolina has adopted a rule that precisely this type of argument by a prosecutor in a death penalty case is reversible error. State v. Woomer, 284 S.E. 2d

357 (S.C. 1981). The issue in Woomer was strikingly similar to the issue in this case:

> Here, the solicitor attempted to minimize the jurors' own sense of responsibility for appellant's fate by stressing that he himself had already made the same decision that he was now asking them to make.
>
> "You know, the initial burden in this case was not on you all. It was on me. I am the only person in the world that can decide whether a person is going to be tried for his life or not. I mean I had the same thing you all did. I had to make the first decision as to whether or not a person is going to be tried for the electric chair. If I didn't want him tried for the electric chair, there is no way the sheriff or anybody else can make it happen. I had to make the same decision, so I have had to go through the same identical thing that you all do. It is not easy."

Id. at 359.

In reversing applicant's death sentence, the South Carolina Supreme Court reasoned that "when a solicitor's personal opinion is explicitly injected into the jury's deliberation as though it were in itself evidence justifying a sentence of death, the resulting death sentence may not be free from the influence of any arbitrary factor as required by S.C. Code Section 16-3-25(c)(1), and by the eighth amendment to the United States Constitution." Id. Subsequently, the South Carolina Supreme Court has adopted this as a per se rule requiring automatic reversal. State v. Butler, 290 S.E. 2d 420 (S.C. 1982); State v. Smart, 299 S.E. 2d 686 (S.C. 1982); State v. Koon, 298 S.E. 2d 769 (S.C. 1982); Thompson v. Aiken, 315 S.E. 2d 110 (S.C. 1984); State v. Thomas, 339 S.E. 2d 129 (S.C. 1986).

In marked contrast, the Supreme Court of Georgia, by affirming that petitioner's death sentence was not imposed as a result of passion, prejudice, or any other arbitrary factor, has approved the type of argument made by the prosecutor here.

Because petitioner's death sentence was affirmed despite the risk that the prosecutor's argument minimized the jury's sense of its responsibility for the sentencing decision, this Court should grant certiorari to determine that this type of prosecutorial comment is impermissible, and to clarify the standard of prejudice to be used when such arguments are made at the penalty phase of a capital trial. See Tucker v. Kemp, 802 F.2d at 1297, 1298 (Kravitch, J., dissenting).

II

PETITIONER'S DEATH SENTENCE, IMPOSED AND AFFIRMED DESPITE THE SENTENCER'S FAILURE TO CONSIDER POWERFUL MITIGATING CIRCUMSTANCES IN PETITIONER'S BACKGROUND, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Supreme Court of Georgia affirmed petitioner's death sentence although it was apparent on the face of the record that the sentencing jury failed to consider extensive mitigating evidence highly relevant to the decision of whether he should live or die. Both the jury and the reviewing court evidently excluded the mitigating evidence from their consideration, in violation of this Court's requirements for individualized sentencing set forth in Lockett v. Ohio, 438 U.S 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); and Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

This Court should grant certiorari to clarify what it means that a capital sentencing jury must "consider" all relevant mitigating evidence. Petitioner asserts that a sentencer's failure to consider relevant mitigating evidence violates the eighth amendment regardless of its cause: just as a sentencer may not be precluded from hearing mitigating evidence, Skipper v. South Carolina, 106 S. Ct. 1669, 1671 (1986), or from allowing

such evidence to play a part in its sentencing decision, Hitchcock, 107 S. Ct. at 1824, it may also not ignore such evidence because it is inconvenient to consider it.[5] This Court's requirement that the capital sentencer must consider all evidence presented in mitigation of death cannot be deemed satisfied when, although boxes of records happen to be placed in the jury room, and in the clerk's office of the reviewing court, it is clear that they are not in any sense considered or acted upon by that jury or that court.

It cannot seriously be doubted that the 2596 pages of medical records which petitioner's counsel introduced constituted "relevant" mitigating evidence. This evidence may have been presented poorly, and in undigested form, but it was presented. The jury heard testimony that the records told the story of petitioner's life from the time he was nine years old until he was eighteen. (T. 500). This description of petitioner's background and character is highly relevant

> because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.

California v. Brown, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring).

It is equally clear that the jury could not possibly have given the evidence any serious consideration. Although the story

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[5] The Court of Appeals for the Fifth Circuit recently suggested that this Court's holdings concerning the requirement that sentencers must "listen" to mitigating evidence might call for a rethinking of the constitutionality of the Texas capital punishment scheme, which confines consideration of mitigating circumstances within the three statutory questions posed to the jury. See Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987); see also, Franklin v. Lynaugh, 823 F.2d 98 (5th Cir. 1987 , cert. granted, 108 S. Ct. 221 (1987), argued, March 1, 1988, 56 U.S.L.W. 3554.

of petitioner's life actually was contained within his medical records, only a single, massive, disorganized, partly hand-written set of the materials was provided to the twelve jurors. The jury could not possibly have even begun to read or understand the over 2,500 pages of medical records in the two hours that it took them to reach their verdict. The jury that imposed petitioner's death sentence did so in violation of Lockett and Eddings, because the jury could not possibly have "listened" to the mitigating evidence in petitioner's case. And no matter how soft the whisper in which petitioner offers his mitigating circumstances, "Lockett requires the sentencer to listen." Eddings, 455 U.S. at 115 n.10.

Concededly, a lay jury cannot realistically be expected to consider relevant mitigating evidence when confronted with a box of over 2,500 pages of medical records. Its job would surely have been made more manageable had trial counsel synthesized the information and presented it to the jury via live witnesses in a form that they could more easily understand.[6] Petitioner's trial counsel himself recognized that the technical nature of the documents, in addition to their sheer volume, would be difficult for lay jurors to understand even if they did read it. In the course of urging the jurors to read the 2,500 pages of documents counsel stated: "Sometimes...[the records] appear to be gobbly-gook." (T. 529). Given the unwieldy condition of the records

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[6] Indeed, counsel's treatment of petitioner's records at the penalty phase falls woefully short of the standard of effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668 (1984); Stephens v. Kemp, No. 84-8540, slip. op. at 21-26 (11th Cir. 4/22/88). Even in the present posture of this case, on direct appeal, counsel's ineffectiveness is apparent on the face of the record, his manner of presenting the evidence could have no conceivable strategic basis, and there is a reasonable probability that a jury properly apprised of the extensive mitigating circumstances would have recommended a life sentence. Petitioner is therefore also entitled to a new sentencing proceeding under the sixth and fourteenth amendments.

and the very short period of time the jury spent deliberating petitioner's sentence, the conclusion is inescapable that the sentencer did not even examine the "bag" and "box" containing petitioner's life history.

Moreover, the Georgia Supreme Court also clearly did not consider the evidence. According to the Georgia capital sentencing scheme, the Georgia Supreme Court automatically reviews each death sentence to ensure that the sentence of death is not imposed as the result of "passion, prejudice or other arbitrary factor." O.G.C.A. § 17-10-35 (1982). This feature of the Georgia statutory scheme was lauded by the Court as an "important additional safeguard," Gregg v. Georgia, 428 U.S. 153, 198 (1976), against the arbitrary and capricious imposition of the death penalty characteristic of capital sentencing before this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972). The arbitrary factor symbolized in the present case by the undigested boxes and bags of critical mitigating evidence, which were not even alluded to in the opinion of the Supreme Court of Georgia, requires that the Georgia Supreme Court's affirmance of petitioner's death sentence be reviewed. While the court was free to decide what weight to give to such evidence, it could not give it no weight. Eddings, 455 U.S. at 114-15.

The evidence ignored by the sentencing jury and the Supreme Court of Georgia was of such dramatic significance that a new sentencing hearing is required.[7] Had petitioner's tempestuous

[7] Striking similarities are presented between petitioner's case and that of Monty Lee Eddings. Like Petitioner Lipham, Eddings was the product of a broken home, where he was abused and raised without proper guidance or supervision. Both young men grew up under the difficult circumstances presented by an alcoholic mother and an abusive father. This Court's conclusion in Eddings is equally applicable to petitioner: "[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing." Eddings v. Oklahoma, 455 U.S. at 116.

background been brought to light, the jury would have considered the life of a different young man than the one they actually reviewed. As far as the jury was able to glean from the penalty phase of petitioner's trial, petitioner was a man who had moved to three different state facilities during his youth, was loved by his wife and son, but neglected by his alcoholic parents. In all likelihood the jury was unaware of the following facts, summarized in the Statement of the Case (at pages 10 to 13, supra):

> 1. Petitioner was raised in a family of alcoholic parents and thirteen siblings, seven of whom either had to be adopted or placed in state custody.
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> 2. His father married his mother when he was twenty six (26) and his mother was eleven (11). Petitioner witnessed his drunken parents fighting and saw them separate and unite several times. He was also aware at an early age that his mother engaged in prostitution during his father's absences from the home.
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> 3. Petitioner's parents severely neglected all of their children. Specifically, his parents gave him inadequate food, clothing and medical care and offered him no supervision, guidance or love whatsoever.
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> 4. In 1972, at the age of nine, petitioner was removed from his parents' home by the State of Georgia and placed in a group home. He had a very poor self-image, feeling that no one could ever love him.
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> 5. At the group home petitioner ran away, stole, was cruel to animals and was severely beaten by the other boys. Petitioner was also permanently expelled from school while at the home. Eventually, officials at the home requested that petitioner be moved because they were unable to supervise him.
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> 6. Throughout petitioner's life, beginning as early as age nine, he engaged in deviant sexual behavior which has included sex with animals and with older men, for money.
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> 7. At the age of thirteen, his social worker feared that, without proper control, he would end up killing someone or being killed.

The conclusion is inescapable that had the jury at least been made aware of these factors they would have viewed petitioner in a different light. This evidence would have helped place petitioner's senseless and brutal crime within the broader context of petitioner's violent and pathetically deprived past. Surely the jury would have been much less likely to impose a death sentence in light of petitioner's catastrophic history. This Court should grant certiorari to consider whether a death sentence imposed and affirmed without consideration of substantial mitigating factors must be vacated as violative of the eighth and fourteenth amendments to the United States Constitution.

CONCLUSION

For the above-stated reasons, petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

May 12, 1988

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fenses of rape and kidnapping with bodily injury. OCGA § 17-10-30(b)(2); *Davis v. State*, 255 Ga. 588, 593, 340 S.E.2d 862 (1986). It is not necessary that the victim of the aggravating felonies be the murder victim. See, e.g., *Cook v. State*, 255 Ga. 565(16), 340 S.E.2d 843 (1986). It is permissible to find both rape and kidnapping with bodily injury as aggravating circumstances even if the rape is the bodily injury of the kidnapping. *Waters v. State*, 248 Ga. 355, 368(11), 283 S.E.2d 238 (1981). It is permissible to use as a statutory aggravating circumstance an offense for which the defendant has not been indicted or convicted. *Putman v. State*, 251 Ga. 605(14), 308 S.E. 2d 145 (1983).

10. The remaining enumerations of error need not be addressed. The defendant's conviction for murder, rape and aggravated sodomy is affirmed. His death sentence is vacated, and the case is remanded for resentencing on the murder count of the indictment.

Judgment affirmed in part, reversed in part.

All the Justices concur.

LIPHAM
v.
The STATE.
No. 44868.
Supreme Court of Georgia.
Feb. 12, 1988.

Defendant was convicted of murder, rape, armed robbery and burglary by the Superior Court, Coweta County, William F. Lee, J., and he appealed. The Supreme Court, Gregory, J., held that: (1) finding that defendant had sexual intercourse with victim prior to or after he shot her was sufficiently supported by circumstantial evidence; (2) victim did not have to be alive at moment of penetration in order for defendant to commit rape; (3) indigent defendant had no constitutional right to demand that attorney whom he retained, but who was not member of state bar, be allowed to represent him; (4) denial of defendant's motion for change of venue based on adverse pretrial publicity was not abuse of discretion; and (5) death sentence was not excessive.

Affirmed.

1. Rape ⇐51(3)

Finding that defendant had sexual intercourse with victim prior to or after he shot her was sufficiently supported by evidence presented in support of rape count, including pubic hair consistent with that of defendant found on victim's housecoat and ballistics evidence suggesting that defendant was lying in bed on top of victim at time he fired pistol. O.C.G.A. § 16-6-1(a).

2. Rape ⇐7

Victim does not have to be alive at moment of penetration in order for defendant to commit rape, where defendant has used deadly force to overcome victim's will. O.C.G.A. § 16-6-1(a).

3. Robbery ⇐24.1(3)

Armed robbery conviction was sufficiently supported by evidence that defendant had shot victim and that he had taken her property, notwithstanding lack of evidence as to whether fatal shooting occurred before or after theft, and whether gun was used in commission of theft.

4. Criminal Law ⇐641.10(1)

If indigent defendant can make own arrangements for attorney representation, whether with financial assistance of family or friends or by persuading attorney to represent him pro bono, he should ordinarily be allowed to do so.

5. Criminal Law ⇐641.10(1)

Indigent defendant had no constitutional right to demand that attorney he retained be allowed to represent him, where attorney was

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6. Attorney and Client ⇐19
Criminal Law ⇐641.10(1)

Denial of indigent defendant's request that member of New York bar be allowed to represent him was not abuse of discretion, where defendant was already well represented by two qualified members of Georgia bar, and attorney had failed to submit proper application for admission to practice in trial of case. Uniform Superior Court Rule 4.4.

7. Criminal Law ⇐126(2)

Denial of murder defendant's motion for change of venue based on adverse pretrial publicity was not abuse of discretion, where trial began over a year after crime was committed, and none of jurors had formed fixed opinions about defendant's guilt or innocence.

8. Jury ⇐63

Jury lists need not include name of every citizen of county eligible for jury service, as long as list includes fair cross section of eligible members of community. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐730(1)

Prosecutor's improper closing argument at sentencing phase of capital murder case, that it was for God and victim to forgive defendant but not for jurors, did not warrant new trial, where trial court rebuked prosecutor for making argument and gave prompt curative instruction.

10. Homicide ⇐354

Death sentence was not excessive, in murder case arising out of homicide defendant committed while engaged in commission of rape, armed robbery and burglary.

Steven D. Fanning, Fanning & Hudson, P.C., Newnan, for William Anthony Lipham.

Arthur Mallory, Dist. Atty., Bill Hambrick, Asst. Dist. Atty., LaGrange, Michael J. Bowers, Atty. Gen., for the State.

GREGORY, Justice.

Appellant, William Anthony Lipham, was convicted in Coweta County of murder, rape, armed robbery and burglary. He was sentenced to death for the murder. He appeals.[1]

1. Kate Furlow, the 79-year-old victim, was last seen by her daughter-in-law at 6:00 p.m. on December 4, 1985. The next day, the victim's son tried to telephone her but she did not answer. He went to her home and observed that the glass had been broken out of the front door and that the living room was in disarray and called the police.

Investigators searched the house and found the victim lying on her bed, nude from the chest down, with a gunshot wound in her head. A .25 caliber bullet was discovered in the mattress underneath her head.

Investigators interviewed the victim's neighbors. One of them stated that a young man had been in her kitchen at 12:30 a.m. on December 5. This neighbor testified that when she asked the man why he was there, he responded only by shouting "Ronnie," and then leaving. She identified Lipham as the man who had been in her home.

Ronnie Simon testified that he gave Lipham a ride the night of December 4, and dropped the defendant off near the victim's home. The defendant had with him a .25 caliber pistol. Simon's girlfriend testified that the defendant came by Simon's trailer early the next morning, carrying his gun, and a small bag containing some change and some costume jewelry. The defendant told her, "Not bad for a night's work ..."

Police recovered a .25 caliber pistol from the defendant's brother which was shown by ballistics examination to be the murder

1. The death sentence was imposed on February 12, 1987. A motion for new trial was filed February 20, 1987, and denied June 23, 1987. A notice of appeal was filed July 16, 1987, and the case was docketed on July 22, 1987. After the parties were granted extensions of time to file their briefs and to prepare for oral argument, the case was orally argued on October 13, 1987.

weapon. The defendant was arrested in Douglasville, Georgia, on January 14, 1986.

The defendant gave a statement to the police admitting that he entered and ransacked the victim's home looking for something to steal. However, he claimed that another person was present and used the defendant's gun to kill the victim.

[1] a. The defendant contends that his conviction for rape is not supported by the evidence because the evidence does not show that sexual intercourse occurred. We disagree.

The victim's body was found lying on her bed, nude from the chest down, with her legs spread apart. She had a "pressed-contact" gunshot wound on the left side of her head, the location of which suggests that the killer was at least on the bed and very possibly lying on top of the victim when he shot her. The autopsist testified that he discovered a large amount of fluid in the victim's vagina that could not be positively identified as seminal, but would have been unusual in the absence of sexual intercourse. A pubic hair discovered on the victim's housecoat was consistent with that of the defendant. We conclude that the evidence, although circumstantial, was sufficient to support a finding that the defendant had carnal knowledge of the victim.

[2] b. The defendant further argues that even if the evidence is sufficient to support a finding that he had sexual intercourse with the victim, it does not show whether it occurred before or after her death.

He contends that if he first killed the victim and only then had sexual intercourse with her, he is not guilty of rape. His authority for this proposition is a federal district court opinion, *Gibson v. Jackson*, 443 F.Supp. 239 (Middle Dist.Ga.1977), which states: "For the petitioner to be guilty of rape, the victim must have been a person, a living human being; if dead before the act—as terrible and disgusting as it may be—the act is not rape." Id. at 247. We are not persuaded by this authority.

The offense of rape is defined in our Code as follows: "A person commits the offense of rape when he has carnal knowledge of a female forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ." OCGA § 16-6-1(a).

There is nothing in this code section which precludes a finding of rape if the victim is not alive at the moment of penetration. What the jury must find is that the defendant had carnal knowledge of the victim "forcibly and against her will." Id.

We have not heretofore addressed the effect of the use of deadly force to overcome the victim's resistance in a rape case. However, with respect to the offense of armed robbery, we have held that where the defendant has used an offensive weapon first to kill his victim and then to take his money, so that the victim is dead when the theft actually is consummated, the theft occurred nonetheless with "the benefit of force or fear which is the essence of armed robbery as defined in OCGA § 16-8-41." *Prince v. State*, 257 Ga. 84, 85, 355 S.E.2d 424 (1987).

We think this reasoning is equally applicable in a rape case. If the element of force is satisfied where the defendant has used less than deadly force to overcome the victim's resistance so as to allow him to have carnal knowledge of the victim, the element of force is surely no less satisfied when the defendant has used deadly force to accomplish his aim.

As for the remaining element, "against her will" has been interpreted to mean "without her consent," and has been satisfied in cases in which the victim was drugged, asleep, unconscious, or in a coma. See, e.g., *Brown v. State*, 174 Ga.App. 913, 331 S.E.2d 891 (1985). We see no reason why it should be any less applicable in a case in which the defendant has rendered the victim permanently unconscious by killing her.

The facts here differ fundamentally from a case in which one happens upon the corpse of a female and engages in sexual intercourse with it. The use of force in the former and the absence of force in the latter is the difference. One is rape and the other necrophilia, made a crime under OCGA § 16-6-7.

The evidence in this case supports the jury's finding that the defendant had carnal knowledge of Kate Furlow forcibly and against her will notwithstanding that it is unclear whether the defendant first raped the victim and then killed her, or first killed the victim and then raped her. Compare *Ross v. State*, 254 Ga. 22, 23, 34, 326 S.E.2d 194 (1985).

[3] c. The defendant also contends that the evidence is insufficient to support the conviction for armed robbery. He argues that the evidence fails to show that a hand gun was used in the taking of the victim's property or that it was even present when the victim's property was taken. We disagree.

It is undisputed that the victim was killed with a handgun. The jury was entitled to infer from the evidence that this defendant, "with intent to commit theft, [took] property of another from the person or the immediate presence of another by use of an offensive weapon...." OCGA § 16-8-41, whether "the victim [was] shot before the taking ... [or] after the taking...." *Young v. State*, 251 Ga. 153, 160, 303 S.E.2d 431 (1983) (Hill, C.J., concurring in part and dissenting in part). Accord, *Prince v. State*, supra.

d. The evidence supports the defendant's conviction on all four counts. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

2. At a pre-trial hearing, Michael Dowd, a member of the Bar of the State of New York, requested permission to represent the defendant *pro hac vice*. The defendant concurred in this request. The trial court ruled that Dowd could participate in the trial of the case, question witnesses, argue any motions, or make closing arguments on behalf of the defendant, but that Steven Fanning would remain lead counsel for the defendant. The court stated that he knew Mr. Fanning to be an experienced, capable attorney familiar with Georgia law and procedure, while Mr. Dowd's knowledge and abilities were unknown to the court. Dowd refused to accept any limitations on his representation of the defendant, and left, refusing to participate further in the case.

The defendant argues that the trial court's ruling deprived him of his right to decide for himself who his lead attorney would be.

[4] Of course, an indigent defendant has no right to compel the trial court to appoint an attorney of his own choosing. *Kesler v. State*, 249 Ga. 462(12), 291 S.E.2d 497 (1982). On the other hand, if an indigent defendant can make his own arrangements for attorney representation, whether with the financial assistance of family or friends, or by persuading an attorney to represent him *pro bono*, he ordinarily may do so.

[5] In this case, however, the attorney whose assistance the defendant sought was not a member of the bar of this state, and neither the attorney nor the defendant had a constitutional right to *demand* that the attorney be allowed to represent the defendant in this case. *Williams v. State*, 157 Ga.App. 494(2), 277 S.E.2d 781 (1981). It was, rather, a matter governed by the trial court's sound exercise of discretion, which will not be disturbed on appeal unless abused.

[6] Dowd failed to submit a proper application for admission to practice in the trial of this case pursuant to Rule 4.4 of the Uniform Rules for the Superior Courts, 253 Ga. 799, 814, and the defendant was already well-represented by two qualified members of the Georgia bar. In these circumstances, the trial court would have acted within the limits of its discretion had it refused altogether to allow Dowd to participate in the trial of this case. It follows, then, that the trial court did not abuse its discretion by offering Dowd a limited admission to practice in this case.

[7] 3. The trial began over a year after the crime was committed. Compare *Patton v. Yount*, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). Although many of the jurors had heard something

about the case, none had formed fixed opinions about the guilt or innocence of the defendant. Only four prospective jurors were excused for cause—three because of their opposition to the death penalty and one for business reasons. We find no error in the denial of the defendant's motion for change of venue. *Ford v. State*, 257 Ga. 461, 360 S.E.2d 258 (1987).

4. Nor do we find any error in the court's denial of the defendant's motion for severance. *Childs v. State*, 257 Ga. 243(1), 357 S.E.2d 48 (1987).

[8] 5. The defendant concedes that blacks, whites, men and women were all well represented on both the grand and traverse jury lists in Coweta County. See Rule II(A)(6) of the Georgia Unified Appeal Procedure, as amended, 252 Ga. A-13 et seq. Nevertheless he contends his challenges to the array should have been granted because non-voters are not included on the list. He notes that only 19.2% of all eligible Coweta County women are on the traverse jury list, and only 4.9% of all eligible Coweta County women are on the grand jury list. Similar figures are claimed with respect to blacks.

As we have pointed out, "The voter list is [by law] the appropriate primary source from which jurors may be selected and must be supplemented only if the resulting list fails to meet constitutional requirements; i.e., fails to represent a fair cross-section of the community. [Cits.]" *Ingram v. State*, 253 Ga. 622, 627, 323 S.E.2d 801 (1984).

The percentages cited by the defendant show only that the jury lists are smaller than the total eligible population of the community.[2] "There is no requirement that the jury list include the name of every citizen of the county eligible for jury service. The list must include a *fair-cross-section* of the eligible members of the community, not every eligible member of the community." Id. at 629, 323 S.E.2d 801. The defendant's challenges to the arrays were properly denied.

[9] 6. Finally, the defendant complains of the prosecutor's sentencing-phase closing argument, in which he said to the jury: "Forgive him. I'll say to you, that's fine, but you don't have that right. I'll tell you who has the right to forgive. Kate Furlow has the right to forgive him. God has the right to forgive him. You don't."

This argument is similar to one we condemned in *Ford v. State*, 255 Ga. 81, 93–95, 335 S.E.2d 567 (1985). Here, as in *Ford*, the defendant did not object to the argument. However, in this case, the trial court, on its own, rebuked the prosecutor for making the argument and gave the following instructions to the jury:

"THE COURT: Ladies and gentlemen, just a moment ago before and during the course of Mr. Mallory's argument, he made some reference to the fact that the right to forgive the defendant is with God and Ms. Kate Furlow, implying that it was not for you to forgive and it was up to God and Kate Furlow to forgive. Ladies and gentlemen, you have found the defendant guilty of murder and guilty of these offenses. This defendant is not going to be forgiven of anything. That was improper argument by Mr. Mallory and Mr. Mallory, don't do that again, please.

"MR. MALLORY: No, Your Honor.

"THE COURT: The question here is not whether the defendant will be punished for this murder. The question is how much he will be punished. Will he be given the death penalty or will he be given life imprisonment. Neither the death penalty nor life imprisonment is forgiveness and Mr. Mallory was incorrect when he was talking about that. You have the right to be merciful in this case, if you think that's the right thing to do, and if you are merciful in this case you are not forgiving the defendant; and I instruct you not to consider any argument made by the State along those lines. That's an improper argument."

In light of these instructions, we find no reversible error.

SENTENCE RE

7. The jury found as
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committed while the offen
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§ 17-10-30(b)(2). The e
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offenses. *Davis v. State*,
340 S.E.2d 862 (1986).

In addition, the ju
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disjunctive finding of "tor
of mind." The finding
returned in the conjunct
State, 256 Ga. 191, 194
(1986); *West v. State*, 252
S.E.2d 67 (1984); *Patrick*
168, 274 S.E.2d 570 (198
the death sentence is affi
of the remaining finding
gravating circumstances.
supra, 255 Ga. at 595, 3

[10] 8. We do not
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passion, prejudice or othe
and we do not find tha
death is excessive or d
sentences imposed in sir
ering the crime and the

Judgment affirmed.

All the Justices concu

APPEN

Curry v. State, 255 G
762 (1985); *Ross v. Sta*
S.E.2d 194 (1985); *Devi*
604, 323 S.E.2d 150 (19

2. The total 18-and-over population of the county is 26,930, according to the most recent census. There are 5,179 names on the traverse jury list and 1,289 on the grand jury list. The traverse jury list therefore contains 19.2% of the eligible population, while the grand jury list contains 4.8% of the eligible population. If all cognizable groups are equally represented on the jury lists, then 19.2% of the community population of each cognizable group will be on the traverse jury list, and 4.8% of each cognizable group will be on the grand jury list. Thus, figures comparable to those cited by the defendant will be found not only with respect to women and blacks, but also with respect to men and whites, or to any other group in the community.

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at 629, 323 S.E.2d 801. The
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again, please.

ORY: No, Your Honor.

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In light of these instructions, we find no reversible error.

SENTENCE REVIEW

7. The jury found as aggravating circumstances that the offense of murder was committed while the offender was engaged in the commission of the offenses of rape, armed robbery and burglary. OCGA § 17-10-30(b)(2). The evidence supports the finding that the offense of murder was committed while the defendant was "engaged in the commission of" these other offenses. *Davis v. State*, 255 Ga. 588, 593, 340 S.E.2d 862 (1986).

In addition, the jury found the § 17-10-30(b)(7) statutory aggravating circumstance. However, the jury returned a disjunctive finding of "torture *or* depravity of mind." The finding should have been returned in the conjunctive. See *Page v. State*, 256 Ga. 191, 194, 345 S.E.2d 600 (1986); *West v. State*, 252 Ga. 156, 162, 313 S.E.2d 67 (1984); *Patrick v. State*, 247 Ga. 168, 274 S.E.2d 570 (1981). Nevertheless, the death sentence is affirmed on the basis of the remaining findings of statutory aggravating circumstances. *Davis v. State*, supra, 255 Ga. at 595, 340 S.E.2d 862.

[10] 8. We do not find that the sentence of death was imposed as the result of passion, prejudice or other arbitrary factor, and we do not find that the sentence of death is excessive or disproportionate to sentences imposed in similar cases considering the crime and the defendant.

Judgment affirmed.

All the Justices concur.

APPENDIX

Curry v. State, 255 Ga. 215, 336 S.E.2d 762 (1985); *Ross v. State*, 254 Ga. 22, 326 S.E.2d 194 (1985); *Devier v. State*, 253 Ga. 604, 323 S.E.2d 150 (1984); *Allen v. State*, 253 Ga. 390, 321 S.E.2d 710 (1984); *Felker v. State*, 252 Ga. 351, 314 S.E.2d 621 (1984); *Brown v. State*, 250 Ga. 66, 295 S.E.2d 727 (1982); *Messer v. State*, 247 Ga. 316, 276 S.E.2d 15 (1981); *Justus v. State*, 247 Ga. 276, 276 S.E.2d 242 (1981); *Green v. State*, 246 Ga. 598, 272 S.E.2d 475 (1980); *Cape v. State*, 246 Ga. 520, 272 S.E.2d 487 (1980); *Thomas v. State*, 245 Ga. 688, 266 S.E.2d 499 (1980); *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979); *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979); *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729 (1979); *Spraggins v. State*, 243 Ga. 73, 252 S.E.2d 620 (1979); *Davis v. State*, 242 Ga. 901, 252 S.E.2d 443 (1979); *Johnson v. State*, 242 Ga. 649, 250 S.E.2d 394 (1978); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1 (1978); *Gibson v. State*, 236 Ga. 874, 226 S.E.2d 63 (1976).

KEY NUMBER SYSTEM

FUNDERBURKE
v.
KELLET et al.
No. 45175.
Supreme Court of Georgia.
Feb. 12, 1988.

Owners of security deed on property sold at tax sale brought action to quiet title after their tender of redemption price was refused. The Superior Court, DeKalb County, Robert J. Castellani, J., concluded that right of owners of security deed to redeem property had not been foreclosed and title should be vested in them. Holder of tax deed appealed. The Supreme Court, Gregory, J., held that: (1) published notice of foreclosure of right to redeem property sold at tax sale did not satisfy due process requirements, and (2) there was ample circumstantial evidence from which trial court could have found that property was com-

APPENDIX B

27-2534.1 [17-10-30] Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed.

(Acts 1973, pp. 159, 163.)

Editorial Note to Ga. Code Ann.

That portion of subsection (b)(1), which allows for death penalty where "murder [is] committed by a person who has a substantial history of serious assaultive convictions," is unconstitutional and, thereby, unenforceable. Arnold v. State, 236 Ga. 534, 224 S. E. 2d 386 (1976). Such portion of subsection (b)(1) was not carried forward into the Code of 1981.

27-2537 [17-10-35] Review of death sentences

(a) Whenever the death penalty is imposed, upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court.

(b) The Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection (b) of Code Section 17-10-30; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant.

(d) Both the defendant and the state shall have the right to submit briefs within the time provided by the court and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court in its decision and the extracts prepared as provided for in subsection (a) of Code Section 17-10-37 shall be provided to the resentencing judge for his consideration.

(f) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

(Acts 1973, pp. 159, 165.)

APPENDIX C

ANNEEWAKEE, INC.
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A 6 826

ANNEEWAKEE FOUNDATION, INC.

4771 Anneewakee Road
DOUGLASVILLE, GEORGIA 30135
Phone: 404-942-2391

PRELIMINARY HISTORY INFORMATION

INSTRUCTIONS: Please fill this form in USING EITHER PENCIL OR TYPEWRITER. If you need additional space for your answers, it is all right to use blank sheets of your own. This form must be returned before any visit can be arranged to Anneewakee. A check in the amount of [redacted] must accompany this enrollment application.
$[redacted].00

I. Name: William Anthony (Tony) Lipham
Address: % Troup Co. Dept. of Family & Children Services Telephone No. 884-2331
City: P. O. Box 1265, LaGrange, State: Ga. Zip Code: 30241
Date of Birth: 8-26-63
Place of Birth: Columbus, Ga. (Muscogee Co.)
Student's religion (denomination, if any): None
Height: 60½" Weight: 108 lbs.
Eye Color: Brown Hair Color: Dark blonde.

Black & White PHOTO (taken in last 3 months)

II. FAMILY INFORMATION

	Name	Birth Date	Nat'l Heritage	Education	Occupation & Soc. Sec. No.		Religion
(Father)	Hugh Richard Lipham Sr.	09-18-18	American	6th gr.	Truck driver	Unk.	None
(Mother)	Aline Cummings Lipham	10-05-37	American	6th gr.	Waitress	Unk.	None
(Step-father)	None.						
(Step-mother)	None						

Date of marriage of parents: 1950

If either or both parents have remarried, or had previous marriages, please give date. Neither parent has remarri
Mr. Lipham did have a previous marriage, with two sons by his first wife. Da
of his first marriage is unknown.

Marital status of parents:
Separated: X Legal (Yes or No) _____ Date: 1974
Divorced: _____ Date: _____ Widow or Widower _____ Date: _____

List in chronological order, all births, giving names of all children (including child for whom application is being made), living and dead, step brothers and half sisters. Also include in this list in order of their occurrences, dates of miscarriages and still-births, if any.

(No miscarriages or still births).

Name	Sex	Birth Date (or date of termination of pregnancy)	Education and/or Occupation	Comments
Lamar Lipham	M	10-5-69	1st grade	Has been adopte
[illegible]issa Lorraine Lipham	F	12-8-67	3rd grade	Has been adopte
[illegible]hristopher Steven Lipham	M	12-30-66	5th grade	Has been adopte
William Anthony Lipham	M	8-26-63	6th grade	Applicant

Name of person filling out this form: Dottie Ragland Date: 8-10-76 Relationship to above person: Caseworker, Supervisor
Troup DFCS, LaGrange, G

(1st of siblings continued on separate sheet)

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ANNEEWAKEE FOUNDATION, INC., DOUGLASVILLE, GA.

Preliminary History Information

William Anthony (Tony) Lipham b. 8-26-63

List of siblings (continued):

Name	Sex:	Birthdate	Education or Occupation:	Comments:
Cynthia Darlene Lipham	F	3-16-62	9th grade	At Ethel Harpst Home
James Eugene Lipham	M	2-2-61	10th grade	On runaway fr United Meth. Children's Ho
John Frank Lipham	M	1-31-60	10th grade	At YDC.
Robert Joe Lipham	M	11-21-58	10th grade	At YDC.
Roy Scott Lipham	M	7-18-57	11th grade	Navy.
Kenneth Allen Lipham	M	6-20-56	10th grade	Whereabouts unknown.
Hugh Richard Lipham, Jr.	M	09-29-54	11th grade	LaGrange, G
Shirley Lipham Gay	F	About age 24.	8th grade	Atlanta, Ga
Huey Lipham	M	About age 26.	Unk.	Twins, retar Are half brother to other childre
Dewey Lipham	M	About age 26.	Unk.	Live in Alabama.

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III. When were the child's difficulties first noticed, and by whom, (i.e., teacher, doctor, family, friend, etc.) Use additional paper if necessary.

SEE ATTACHED SHEET.

What recent events or behavior brought about your request for enrollment? Use additional paper if necessary.

SEE ATTACHED SHEET.

Please describe briefly your goals and expectations for your child and what you hope Anneewakee can accomplish. Use additional paper if necessary.

SEE ATTACHED SHEET.

List other children or adults who have lived, or do now live in the home, or who are otherwise important to the student. (Give name, relationship to student, age, education or occupation, comment on each.)

SEE ATTACHED SHEET.

* Birth information previously sent.

IV. Was child born to you? N/A Adopted by you? N/A If yes at what age? N/A

If born to you, duration of pregnancy: full term? _____ Birth Weight: _____

premature? _____ Terminal month? 5th ( ), 6th ( ), 7th ( ), 8th ( ), Birth Weight: _____

Nature of delivery: Natural? _____ Forceps? Low ( ) High ( ) Caesarian? _____ Breech? _____

Condition of child at time of birth: _____

If child was adopted, was it private placement? N/A agency placement? N/A Date of adoption N/A

If through an agency, give name and address of agency N/A

Is child attending school now? Yes What grade? Ungraded Name of school? Special school at WCGRH.

If an ungraded class, state approximate grade achieved 6th grade.

If not enrolled, name last school attended, and grade achieved N/A

If withdrawn, when? N/A Explain: N/A

If expelled, when? N/A Explain: N/A

V. On separate sheet please list, IN ORDER OF ATTENDANCE, all school environments child has had. ALSO, names of Tutors, if any. Give name, address, indicate public or private, grades covered. See separate sheet.

VI. On a separate sheet please list all doctors and other professional people who have examined and/or treated your son. Give name, address, nature of service, age of child when seen. See separate sheet.

VII. If there is a history of an epileptic or convulsive disorder give details. N/A

VIII. List any specific allergies to foods, drugs or other substances. None.

IX. State in your own words the nature of your child's present problems, and previous difficulties. (Use separate sheet of paper)

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ANNEEWAKEE FOUNDATION, INC., DOUGLASVILLE, GA.

Preliminary History Information

William Anthony (Tony) Lipham, b. 8-26-63

III. When were the child's difficulties first noticed, and by whom?

Tony was experiencing some problems in the first and second grades, during which he was living at home with his parents. (See social summary sent previously). He began to exhibit serious behavior problems, sexual deviations, and sociopathic tendencies at the Anne Elizabeth Shepherd Home in Columbus where he was placed after removal from his parents in October of 1972. (See reports from Anne Elizabeth Shepherd Home which were sent previously).

What recent events or behavior brought about your request for enrollment?

Tony was moved from the Anne Elizabeth Shepherd Home to the C&A Unit at Central State Hospital on 3-7-75 and was later moved to the C&A Unit at West Central Georgia Regional Hospital when that facility opened. He has made no progress and the hospital staff do not think their treatment program will ever reach Tony. (See attached report and letters sent previously which relate Tony's problems).

Please describe briefly your goals and expectations for your child and what you hope Anneewakee can accomplish-

Unless this child's sociopathic tendencies are redirected, he will eventually kill someone or enrage someone else to the point of killing him. He is not presently able to live with other people and will never be a productive member of society unless his self-image is changed and he becomes motivated to get along with other people.

Persons Important to Student:

Tony has a very unrealistic picture of his mother and a constant longing to see her, although he is aware that she cares nothing for him and is not even willing to make the effort to visit him. He has a hopeless wish that his parents will get back together and that he can return to them. He likes to visit his father and talks about him, but is not as strongly attached to his father as to his mother. He seems to care little for any of his brothers and sisters.

William Anthony (Tony) Lipham b. 8-26-63

V. School Attendance:

Name of School:		Grades attended:
Southside Primary 115 E. Cannon St. LaGrange, Ga.	Public School.	Grades 1 and 2.
Double Churches Elementary School, Double Churches Rd. Columbus, Ga.	Public School (attended while living in Anne Elizabeth Shepherd Home, Columbus)	Grades 2, 3, 4.
Special School at Central State Hospital Milledgeville, Ga.	Ungraded.	3-7-75 through 6-11-75.
Special School at West Central Ga. Regional Hosp. 3000 Schatulga Rd. Columbus, Ga.	Ungraded.	6-11-75 to present.

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William Anthony(Tony)Lipham b. 8-26-63

VI. Medical Information

Name of Doctor :	Time of Contact:
Dr. C. P. Major Clark Holder Clinic LaGrange, Ga.	Routine physical examination at age 9. (Copy attached).
Dr. Paul Mandeville Clinical Psychologist Columbus, Ga.	Psychological evaluation at age 9. (Copy sent previously.
Dr. Ron Lewis Child Psychiatrist Family Counseling Center Columbus, Ga.	Tested at age 11. (Copy of report sent previously)
Professional Staff at Central State Hospital & West Central Ga. Regional Hospital	(Reports sent previously from these hospitals and one attached.)

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IX. Child's present problems and previous difficulties:

Tony's problems have been detailed in social summaries, psychological evaluations, and reports sent previously; therefore, this will be a brief summary of all materials. Tony was severely neglected and possibly abused when he was at home with his natural parents. He had inadequate food, inadequate clothing, inadequate medical care, inadequate supervision, and no love or guidance from his parents. He was already developing behavior problems,especially in school, and was beginning to follow the pattern of his older brothers, all of whom have spent time at YDC for various delinquent acts. Tony's parents are alcoholics; he saw them fighting with each other when drunk, saw them separate and reunite several times, and possibly was aware that his mother was involved in prostitution during his father's absences. At the time Tony was removed from his parents in October of 1972, his self-image was already very poor; he saw himself as an unimportant person not worthy of love. He was an independent little boy who had been accustomed to taking care of himself and who was unable to accept adult supervision and guidance readily. Tony is average in intelligence, but was not encouraged or motivated to do well in school by his parents and who therefore has not reached his highest potential for learning.

When Tony was ~~moved~~ removed from his parents, he was placed at the Anne Elizabeth Shepherd Home, a group home in Columbus, where he remained from 10-20-72 to 3-7-75. The Home was not able to help Tony; his behavior grew even worse while he was there. There were episodes of running away, stealing, cruelty to animals, fighting and antagonizing the other boys to the point they beat him severely, extremely disruptive and belligerent behavior at school which caused him to be expelled permanently, and several kinds of sexual acting out. Tony made advances to several boys and girls at the home, was caught trying to engage in sex acts with dogs, stuck his finger in the rectums of chickens, and performed oral sex on an adult male for money. Some of the boys at the home became so disgusted with Tony's irritating behavior and complete lack of regard for other people, that they held a kangaroo court, sentenced him to a beating, put him in the middle of a bed, and stood around the bed beating him with belts. Tony received a severe beating and was sore and stiff for quite some time. Tony would accept no discipline or corrections from any adults at the home and became so uncontrollable that he was in danger of serious harm from the other boys or could possibly have harmed one of them seriously. The Home worked with Tony, but made no progress and therefore requested that Tony be moved.

On 3-7-75, Tony was placed in the C&A Unit at Central State Hospital. Regarding his course from the Hospital, he ~~has~~ had to make some progress. On 8-11-75, Tony was moved from Central State Hospital to West Central Georgia Regional Hospital when the C&A Unit became operational there. According to reports from the Hospital, Tony has made no progress and is becoming a sociopathic person who will never be able to live and get along with other people. Tony often provokes ~~and~~ fights with other children in the C&A Unit and several

(continued)

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IX. Child's present problems and previous difficulties (continued):

times the staff have pulled big boys off Tony to keep Tony from being seriously harmed. There are some young, small , Schizophrenic and serious disturbed children in the Unit; Tony keeps them terrified because he makes sexual and physical threats toward them. Tony's sexual acting out remains a constant problem. He is always talking about sex to other children and to staff members and is still making sexual advances, especially to younger boys and female staff members. Once he was put in the time-out room in nothing but a paper shirt because he had just run away and the staff thought no clothes might keep him from trying to run away again. When released from time-out, he stood up on a table, opened the shirt, pointed his penis at a female staff member, and burst forth with some vulgar sex talk about what he would like to do to her. Tony is very destructive with his clothes and belongings and is never satisfied with what he has. He always wants more clothes, a toy or game that someone else has, and loses interest in items almost as soon as he gets them.

On 8-10-76, Miss Peggy Swain, Tony's Social Worker at C&A Unit, stated that Tony has shown some improvement during the last few days. The Hospital has an armband and token system. A child starts out with a red armband; as he follows rules and acts appropriately, he earns tokens and can move up to a yellow armband when he earns enough tokens. If good behavior continues, a child can earn a green armband after a certain number of days. Each successive armband carries greater privileges. With a yellow armband, a child can have visitors and can go out of the C&A building. With a green armband, a child can have overnight or weekend passes to visit family or sponsors. Tony has been on a yellow armband since the week of August 2, 1976. If good behavior continues, he will receive a green armband on 8-13-76. Tony has also been involved in Boy Scout activities and is to be inducted on 8-28-76. Tony's medication was recently increased; this has slowed him down quite a bit and he has put on several pounds during the last month. He has also grown a lot taller during the past several months and is now about to reach a more normal size for his age group. Tony has asked for a visit with his father and, surprisingly, his father has just come in to request a visit with Tony. This visit has been arranged for 8-22-76.

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Tony Lipham
Consultation - June 20, 1976

Dr. Mazur asked me to see this 11-year-old boy in consultation.

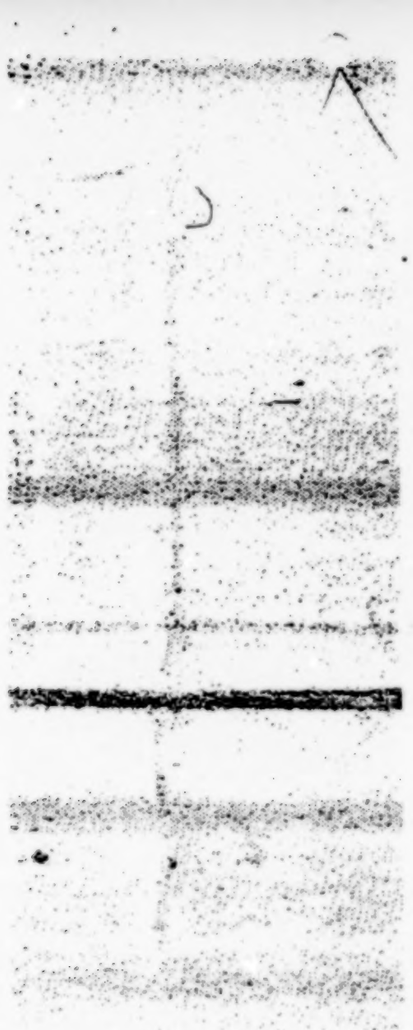
Tony Lipham was seen on 6-20-76 at West Central Regional Hospital. Tony is 11-years-old and gave his date of birth correctly as 8-26-63. Born at Columbus General Hospital. Tony is of the appropriate size according to his chronological age. When I asked for him he came out of his bedroom where he had been sleeping most of the Sunday. He was disheveled, somewhat sleepy but cooperative. He told me he spent one year at Central Hospital and Mr. Myers wants to take him home. He claims Mr. Myers is working at the adolescent unit and has children of his own age. He would rather go to a home than stay longer in the hospital. The boy is appealing but shows little affect and seems to be quite detached. He told me his parents got divorced. His mother still writes him. His father is in La-Grange and his has nine brothers and three sisters. He has been away from them since the age of nine and was in the 5th grade at school when he left. He can do simply arithmetic tasks: 5+6=11, 11+7=18, 11-6=5, 18-9=9. His general fund of information seems to be fair. There was no smile when he discussed this. He does not have a favorite book and he does not have a favorite T.V. story. The only thing he is afraid of is snakes. He claims that he sleeps during the day because he stays up too late at night, it is too noisy on the unit and he cannot sleep. He denies hearing any voices. There have been no bad dreams and no nightmares that upset him. He does not like the food here. He likes pizza and his mother sometimes got him pizza when he was still at home. I asked him what he wants to do later on and he said that he would like to be one of those people that come and work here, meaning the aids at the children's unit. He has one friend only and that is John and he would like to have more friends. His only wish is to get out of here. He wants to go to a foster home and to a real school. He also wants to find his brothers and sisters. He claims that he has stayed so long at the hospital because he was so bad and he is convinced of this. He likes Mrs. Newman. She took him home. While he talks he lies back on the couch. His socks are torn and all of his toes look out. He told me that nobody buys clothes for him and he just has to wear what he has.

Diagnostic Impression: This is a typical picture of a very deprived child who is about to become institutionalized. He seems to have lost a great deal of interest in his environment and in life in general and merely conforms to demands made on him. In this case I would suggest to get him out of the institution at the earliest possible time and place him in some form of a group home where they could tolerate him. He is not suitable for a foster home at this point in time and he cannot be returned to his own family.

Diagnosis: Behavior disorder of childhood, [illegible] from the reaction to [illegible] personality disorder. [illegible]

[illegible]
[illegible], M.D.

MEE:ca
6-23-76



10-22-[illegible]

Carole, MEDICAL RECORD NO. L-536
LIPHAM, WILLIAM TONY MALE
TROUP CO. DFACS
LAGRANGE, GA

Jerry Lee's phone # 10-6-76
404-882-3298 I forgot --
to ask for my picture I
Tony while I was there
yesterday. Can you send
me one?

Thanks-
Dottie

File

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MEDICAL RECORD NO. L-936
LIPHAM, WILLIAM TONY
TROUP CO. DFACS
LAGRANGE, GA
DOB 8-26-61

MALE
ANNEEWAKEE TREATMENT CENTER

DOA 10-6-76 PSYCHIATRIC EVALUATION

NAME Tony Lipham AGE 13 DATE 10/6/76

HISTORY I have been at W. J. R. Hospital for 2 months. Before at Milledgeville 2½ months at the Children Unit. Before in a foster home in Cherokee x 2 years.

EXAMINATION Sleepy. Does not volunteer information. Denies problems. Lacks of emotional reaction, flat intellectual in a young boy. Not found by. Has delusions. Auditory hallucinations. Behavior appropriate. Speech - Slow monotonous. Well oriented. I.Q. - Dr. Joseph

WORKING DIAGNOSIS AND PROGNOSIS 1) Unsocialized aggressive reaction of childhood 2) Sexual maladjustment.

RECOMMENDATIONS Close observation. Not to be allowed to be close with younger boys. Consistent use of limits for his anti-social - aggressive - sexual behavior.

DISPOSITION To be admitted to Ethel Hall. To be released.

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PSYCHIATRIST

→ He was at his home until age 9. I was having problems in the School. (?) I has fights, I did not want to go to School. I has some brothers + sisters. Two or three siblings are younger. One of the brothers was in a Mental hospital for a while. Father is Truck driver, Mother is living in Fla. Parents are divorced for first years. He was close to father he lives in Lafayette, Ga.

Pt. states that he is not close to any relative, or the brothers or sisters. Admission note states pt. is physically aggressive, sexual acting out with younger boys. Problems in School. He has been on Ritalin 5 mg b.i.d. for the last year.

Boy is impressed as a tough, older boy; who has been brutalized by his long years in institutions. Needs firm limits, plus affection and security.

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DISCHARGE SUMMARY
WEST CENTRAL GEORGIA REGIONAL HOSPITAL

NAME: Lipham, William Anthony

ADDRESS: Troup County Department of Family and Children Services, P. O. Box 1265, LaGrange, Troup County, Ga. 30240
PHONE: 884-2331

DATE OF BIRTH: 8-26-63

AGE: 11 SEX: Male RACE: White

HOSPITAL UNIT: Child and Adolescent

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ADMISSION DATE: 6-11-75

ADMISSION DIAGNOSIS: Unsocialized Aggressive Reaction of Childhood 308.4

DISCHARGE DATE: 10-5-76

PROFILE:

This eleven year old boy was admitted to the C & A Unit at West Central Georgia Regional Hospital two days after he was discharged from Central State Hospital where he had been in residence for a period of three months. In the 48-hour hiatus, he was housed temporarily by the Troup Co. Department of Family and Children Services in a temporary foster home. The patient is a ward of the Troup Co. Department of Family and Children Services and was admitted voluntarily.

REASON FOR ADMISSION:

The patient was in actual fact a transfer from Central State Hospital. His admission there was necessitated by his asocial behavior in a private children's home involving sodomy, cruelty to animals, incest and fighting with his peers and disrespect to the staff.

PRESENTING PROBLEMS:

(1) Sexual acting out
(2) Aggression
(3) Lack of superego (Conscience)
(4) Fixated at the anal level
(5) Cruelty and abuse to peers and staff
(6) Fighting
(7) No home
(8) Demand for immediate gratification
(9) [illegible]
(10) Cursing

HISTORY OF PRESENTING PROBLEMS:

Apparently, this young man came from a totally chaotic and disorganized home and was, I believe, eleventh in a sibling group of twelve. Of the entire dozen, he was considered to cause the most difficulty in the neighborhood and community.

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This aggressive, hostile, antisocial behavior extended back to at least age six or seven. Documentation further into the background is not available.

SOCIAL AND DEVELOPMENTAL HISTORY:

Patient's father, in his fifties, has a minimum education, is chronically unemployed, has poor physical health, and suffers from alcoholism. The mother, in her late thirties, was married to Mr. Lipham when she was 11 and he was 26. Her whereabouts are unknown. She too is reported to be an alcoholic. Reports of abuse to the children were common. There are eleven siblings, ranging from adults to children under ten. Several of them have been in YDC or jail. The four children younger than Tony seemed to have faired the best in that at last report they are in foster care and "doing well." Tony was the product of a full-term spontaneous breech delivery. He suffered no neonatal difficulties; birth weight eight pounds. No developmental milestones are known; however, at the age of eight he had a full-scale psychological battery done which proved him to be functioning within the average range of intelligence with a measured IQ of 91. His school career was a stormy one. Although he did poorly, he apparently was passed and at the time of admission to Central State had been attending a fifth grade class at a local school until he was suspended for extremely disruptive behavior. Medical history was essentially unremarkable. He was reported to have had measles, chicken pox, and mumps by the age of five. He lost the index finger on his right hand in a lawn mower accident when he was a toddler. He had never been hospitalized. No immunization record was available.

COURSE IN HOSPITAL:

Tony's physical health in the hospital was excellent. His appetite was good. He slept well. He received immunization for diphtheria, tetanus, and polio with one shot and one dose of oral polio vaccine due at the time of discharge. Hearing, vision, and speech were all considered normal. An EEG done while he was resident at Central State was interpreted as normal. During Tony's sixteen-month stay at West Central Georgia Regional Hospital, a variety of treatment programs were attempted in an effort to develop in this young man a sense of social awareness, property rights, and rights of others. All met with singular lack of success. Programs attempted were: Behavior modification token economy, operative on the unit. However, Tony had no use for earning tokens, did not value property, either personal or that of others, sufficiently to acquire an item he wanted or a privilege he had to earn. Positive reinforcement for acceptable behavior was repeatedly tried. Various sponsor families, who showed an interest, were brought into the picture as a reward for good behavior without effect. One to one intensive psychotherapy was without effect. Peer pressure proved to be ineffective. Group therapy was discarded when his disruptive behavior interfered with the normal process in the group.

Due to the boy's extremely aggressive behavior toward his peers and younger children on the unit, efforts were made to curb his aggression with various tranquilizers during the course of his year's stay. That which proved to be most effective was [illegible] Tony never went for as long as a week without being [illegible] destructive.

RECOMMENDATIONS AND SUMMARY:

The recommendations, accumulations of many conferences by the entire staff and several consultations with consultant psychiatrist, were [illegible] placed in a situation in which he would have to earn his [illegible] acceptable

behavior. Unfortunately, the setup on the C & A Unit provides most of the necessities, such as, a varied diet, trips, educational opportunity and the like, regardless of the patient's behavior. Referral and transfer to Annewakee Residential Center in Douglasville, Georgia was accomplished.

DISCHARGE DIAGNOSIS:

Unsocialized Aggressive Reaction of Childhood 308.4

MENTAL STATUS AT DISCHARGE:

Tony was in contact with reality. He could tell you right from wrong but made no effort to distinguish right from wrong in his actions.

ASSETS AT DISCHARGE:

(1) Can be polite and mannerly
(2) Can be friendly and outgoing
(3) Physically healthy and attractive
(4) Showed a strong interest in boy scouts
(5) Average intelligence
(6) Enjoys contact sports

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PROGNOSIS:

Poor

Jane A. Rivers, M. D.

JMR:dp
cc: Annewakee Residential Center

MEDICAL RECORD NO. L-636
LIPHAM, WILLIAM TONY MALE
TROUP CO, DFACS
LAGRANGE, GA
DOB 8-24-63 DOA 10-6-76

ANNEEWAKEE
PSYCHOLOGICAL EVALUATION

Please address the following:
- Date Tested
- Test Administered
- Introduction
- Intellectual Eval.
- Personality Evaluation
- Treatment Recommendations

Recorder, please sign & date report.

PSYCHOLOGICAL DISCHARGE EVALUATION

NAME: ANTHONY (TONY) LIPHAM

DATE OF EVALUATION: 12-17-81

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INTRODUCTION

Tony is an 18 year old white male adolescent who has been at Annewakee for five years and two months and will be discharged on December 24, 1981. Tony was referred to the Annewakee Treatment Center after being in the custody of the State for running away behavior, sexual acting out, aggressive activities, and school difficulties. Prior to Tony's coming to the Annewakee Treatment Center, Tony lived for a period of time with his parents and 14 siblings where the social environment was extremely chaotic and there was neglect and abuse of Tony and his brothers and sisters as a result of the parents' alcoholism. Tony was removed from his parents custody in 1972 and spent three years at the Sheppard Children's Group Home in Columbus, Georgia. Tony was then referred from the Sheppard Home as a result of increased acting out behavior and unmanageability and was referred to the Child and Adolescent Unit at Central State Hospital. Tony stayed at this placement for several months and then was transferred to the West Georgia Regional Hospital and spent approximately a year in this setting. Additional problems included poor self-concept, apathy towards himself and poor social interactions.

Tony's family has been minimally involved in treatment and Tony began attending the home of one of his group leaders for home visits. He has become increasingly attached to this family and the family has indicated their interest and willingness to have Tony move in with them following his discharge from the Annewakee Treatment Center. Tony's plan includes living with this family, becoming involved in a number of carpentry jobs and completing high school while working. He is optimistic about his future and feels extremely positively about Annewakee and about the changes he has made since being admitted to the treatment center.

PREVIOUS EVALUATION

When admitted to Annewakee in October of 1976, Tony was administered the Wechsler Intelligence Scale for Children (Revised), House-Tree-Person, Bender-Gestalt, Rorschach Psychodiagnostic Test, Sentence Completion, and Minnesota Multiphasic Personality Inventory. At that time, Tony was found to have a Verbal IQ of 75, a Performance IQ of 104, and a Full-Scale IQ of 87. The following subtest scores were obtained at that testing:

ATC 210 (2-79)

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VERBAL		PERFORMANCE	
Information	5	Picture Completion	13
Similarities	8	Picture Arrangement	8
Arithmetic	6	Block Design	9
Vocabulary	3	Object Assembly	14
Comprehension	8	Coding	9

It was noted that Tony was much more proficient in tasks involving perceptual motor functions and had significantly greater difficulty with verbal tasks.

The MMPI was administered and the following raw scores, K. Scores and some raw and K scores were obtained.

	L	F	K	Hs	D	HY	Pd	Mf	Pa	Pt	Sc	Ma	SI
Raw Score	6	18	5	17	32	28	24	23	19	34	40	23	37
K				3			2			5	5	1	

The personality evaluation indicated that Tony had pervasive anxiety, some emotional blunting, and an intense need for support as he had unmet nurturance needs. The testing also indicated that Tony had strong aggressive feelings and was apathetic about his life. In addition, it was found that Tony was very clumsy in expressing his needs, had low self-esteem, was frequently passive when confronted, but had the strengths of being outgoing and friendly. Diagnosis was that of Anxiety Neurosis (300.0 DSM II), and Overanxious Disorder of Adolescence (308.2, DSM II).

PRESENT EVALUATION

The Wechsler Adult Intelligence Scale (Revised), Incomplete Sentences, MMPI, and Drawing Tests including House-Tree-Person, Family and Self Drawings were administered. On the Wechsler Adult Intelligence Scale (Revised) Tony earned a Full-Scale IQ of 88 which falls between the 16th and 25th percentiles and fall in the low average range of functioning. Tony earned a Verbal IQ of 81 which falls at approximately the 9th percentile and a Performance IQ of 100 which falls at the 50th percentile. The following subtest scores were obtained:

VERBAL		PERFORMANCE	
Information	4	Picture Completion	10
Digit Span	7	Picture Arrangement	9
Vocabulary	5	Block Design	12
Arithmetic	6	Object Assembly	11
Comprehension	4	Digit Symbol	7
Similarities	7		

Tony's intellectual functioning is roughly consistent with what was found in the previous testing in that he has a significant and unusual discrepancy between his language and visual motor functioning which is frequently found in youngsters with learning disabilities. In this testing, Tony's strength involved abstract reasoning and spatial conceptualization. He was generally consistent across the other subtests. Tony was cooperative throughout all of the testing and applied himself

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FINAL DIAGNOSES

Conduct Disorder of Adolescence, Undersocialized, Aggressive Type, 312.00, in remission.

Attention Deficit Disorder with Hyperactivity, 314.01

EXTENT TO WHICH TREATMENT GOALS WERE REALIZED:

Tony's course of treatment was fraught with inconsistent behavior. He is extremely dependent and still needs to be the center of attention. He has increased his respect for authority and has much improved self-control. The psychological discharge evaluation indicates "freedom from depression and generally feels more positive about himself". Also, he shows increased control of aggressive impulses and reduction in anxiety. In general, Tony's admitting symptoms were in remission at the time of discharge. His post-discharge plans included pursuing further training in carpentry and a GED at a vocational technical school. It is felt that Tony's continued success is greatly dependent upon support and structure and continuing therapeutic contact with Anneswake.

Horace Stewart, Ph.D.
Clinical Psychologist
Georgia License #164
Diplomate, ABPP

Ian E. Lipsitch, M.D.
Clinical Director

cs

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with diligence and perseverance to all tasks. He appeared generally comfortable with things that he did not know and pleased when he was able to succeed. He had a realistic reaction to success and failure.

On the MMPI the following scores were obtained:

	L	F	K	Hs	D	Hy	Pd	Mf	Pa	Pt	Sc	Ma	Si
Raw Score	7	13	12	9	18	21	20	27	12	20	24	29	18
K to be added				6			5			12	12	2	
Raw Score with K				15			25			32	36	31	

Results from the MMPI that Tony is no longer depressed and generally feels more positive about himself. He is more trusting and less suspicious, worries less about matters and is less likely to act out his impulses in antisocial ways. There is still elevations in areas representing his feeling different from others and somewhat alienated as well as indications of hypomanic behavior and mood swings.

Results of the personality evaluation indicate that Tony currently feels more positive about himself, his future, and his abilities to cope with his world. He is generally optimistic and cheerful in his outlook and mood. He appears able to inhibit impulsivity and control his aggressive impulses and there are no indications of any severe thinking disorder. Tony comes across as a relaxed, amiable young man who handles his anxiety in generally appropriate ways and seems to be overall happy with his relationships.

Tony reported that if not for Anneewakee, "I would be dead or in jail". He feels that he is strong enough to resist peer pressure and drugs and attributes Anneewakee to "growing me up". Tony feels he currently has the self-discipline and self-control to get along with others and succeed as an individual in his life. It is clear that he has many attachments to the institution of Anneewakee as well as the people who have worked with him and feels that in a sense Anneewakee is his home and his family. However, which is tribute to Tony's ability at this point to establish his own independence, he feels ready to go out and establish a new life of his own apart from Anneewakee, indicating he has resolved many of his dependency needs and is ready to transition as a young adult. It seems clear that Tony has made tremendous growth and strides at Anneewakee in areas including self-esteem, self-control, learning to handle f[illegible]lings and express them, and developing appropriate interpersonal relationships. He also now has realistic expectations and plans for himself which appear to have a high likelihood for success. It is felt that Tony's prognosis is currently good given he will have the continuing support of a family situation outside of Anneewakee and that he will continue to maintain contact with the institution and receive ongoing support and counseling on a monthly basis.

Betsy Gard PhD
Betsy Gard, Ph.D.
Clinical Psychologist
Georgia License #605

cs

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WILLIAM TONY LIPHAM

ANNEEWAKEE

DISCHARGE SUMMARY

DISCHARGE DATE 12-24-81 ADMISSION DATE 10-6-76

Please address the following:

• Initial formulation and diagnosis • Clinical resume • Extent to which treatment plan was realized • • Final formulation and final diagnoses (psychiatric & physical). •

INTRODUCTION

Tony, aged 13 years 1 month at admission, was referred to the Anneewakee Treatment Center by the Troup County Department of Family and Childrens Services and the West Georgia Central Regional Hospital (where Tony was a patient for over one year). The symptoms of Tony's emotional disability include: sexual acting out with younger boys and animals, cruelty to animals, fighting, school problems, poor self-concept, poor interpersonal skills, and a limited ability to verbalize.

INITIAL FORMULATION

Tony is one of 14 siblings, most of whom were adopted out, were placed in a youth development center, or their whereabouts were unknown. The whereabouts of his father and mother were unknown at the time of Tony's admission. Also, there was no information available regarding the background of Tony's mother or father. No early growth or development information are available for Tony. The Family and Children Services notes that Tony was severely neglected and possibly abused by his natural parents. Tony was exposed to an extremely chaotic family which resulted in his removal from the family in 1972 and his being placed with the Ann Elizabeth Shepard Home. His behavior deteriorated which necessitated his being placed at the Central State Hospital on March 7, 1975. He was transferred to a newly formed adolescent unit of West Central Georgia Regional Hospital in June, 1975. Tony made a better response to treatment under the token system and at the time was on Haldol.

INITIAL DIAGNOSES

The initial diagnosis was made by Jose Balbona, M.D.:
1. Unsocialized Aggressive Reaction of Adolescence
2. Sexual Maladjustment

CLINICAL RESUME

Tony was admitted to the Evaluation and Observation Unit for observation by the professional staff and for introduction to the Anneewakee Treatment program. In this Unit, he was involved in the therapeutic milieu, prescriptive education, and in occupational, activity, art, and recreational therapies. He also participated in daily group and individual psychotherapy.

ATC 202 (R 7-80)

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Tony's initial response to treatment was a refusal to sign the Pine Tree and Red Hill Agreement stating that he did not have any problems. He signed the agreement four days later but was still basically uncooperative and demanding. He was often described as being hyperactive, having a short attention span and constantly engaged in infractions of the rules. He was constantly testing limits, destroying property, and trying to intimidate his peers. Two months after his admission, Tony showed only minimal improvement but "seems to have gained some control over his destructive behaviors". Four months after admission Tony began leaving the E&O Unit for work projects with outside therapy groups. On February 22, 1977, he was transferred to the outside therapy group of Currahee. His first year in Currahee was marked by frequent physical illness, attention getting behavior, and conflicts with staff. On February 20, 1978, Tony was transferred to Achunda at South Campus to allow him to expand on this therapy gains. Tony did well with work projects but his progress was marked by ups and downs in his interpersonal relations with his peers and authority figure.

In December, 1978, Tony received his Crest. In April, 1979, after a long search by the Family and Children Services, Tony's father was located and invited to attend Spring Fellowship. A Crest conference was held with Tony's father on April 28, 1979. On May 13, 1979, Tony was once again transferred to the E&O Unit for hitting a group member. On May 27, 1979, Tony was approved to begin to work for entrance into the formal academic classroom. On January 20, 1980, Tony was again transferred to the E&O Unit to take responsibility for "various board campus offenses". He was transferred from the E&O Unit to the group of Chinnyon on January 30, 1980. A weekly unit team report of June 19, 1980, reported that Tony "argues a lot and yells at group members and also at Staff members", and also has difficulty following instructions. On August 22, 1980, Tony was transferred to the group of Kinunka at the Central Campus and entered into the formal academic classroom. The delay experienced by Tony of getting into the formal classroom is based on Tony's enthusiasm in doing work projects, especially those which involved any carpentry. This consumed much of Tony's energy and time as well as interest. In Kinunka he made good progress in the group but became upset and was transferred to the E&O Unit onNovember 29, 1980, because he would not "discuss any issues or feelings with the group". He was able to redefine his goals and was transferred back to Kinunka on December 1, 1980. A unit team meeting of January 12, 1981, reports that Tony still needs to be the center of attention and if not so he becomes grumpy. On May 9, 1981, Tony was placed in the E&O overnight because he left his group without permission. On May 28, 1981, Tony was placed in the group of Wapika in preparation for an extended therapeutic outing. Upon his return from the extended therapeutic outing, Tony was placed in the group of Tawanka (August 14, 1981). In September, 1981, termination plans initiated with Dr. and Mrs. Jenkins agreeing to take Tony into their home.

Throughout Tony's treatment there was no real support or sustained involvement by Tony's natural parents. Tony did not suffer iron any major physical illnesses while at Anneewakee. He did suffer from a very high frequency of minor illness and complaints and could be described as being accident prone and quick to seek medical help for even minor complaints.

Mazur, M.D.

GEORGIA DEPARTMENT OF HUMAN RESOURCES

WEST CENTRAL GEORGIA REGIONAL HOSPITAL
3000 Schatulga Road / P. O. Box 6563 / Columbus, Georgia 31907 / Phone: (404) 563-7110

SEP 27 1976

September 24, 1976

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CLINICAL SUMMARY

(For the period 6-2-76 to 9-23-76)

RE: Tony Lipham
DOB: 8-26-63

Tony was admitted to our C & A Unit on 6-11-75 following his inpatient stay at Central State Hospital from 3-7-75 to 6-9-75. Please refer to the report dated 6-2-76 for a summary of the treatment plans attempted by our staff with Tony from his admission date to 6-2-76. The 6-2-76 report outlined problem behaviors which Tony still presents. Our various individualized behavior modification plans have not achieved long lasting behavioral improvements.

Since 6-2-76 we have endeavored to help Tony in the following ways:

Members of our C & A Clinical Team - Nancy Harper, Jean Newman, Norman Davis, Nellie Hackett, Jeter Icard, and Sam Kelly, along with other hospital clinicians - Dr. Mazur, Dr. Zeitouni, and Dr. Turknett, consulted with the Director of Child and Adolescent Services, Dr. Filley, on 6-7-76 to review and assess Tony's behavioral and psychiatric status, to re-evaluate our treatment approaches, and to plan additional intervention efforts. Tony participated in this day of assessment and planning which resulted in a treatment plan where Tony would receive intensive primary therapy with the goal of building trust. This plan incorporated the assistance of a consulting child psychiatrist. Please refer to the consultation report dated 6-20-76 which we received from Dr. M. E. Ehbrecht. Tony did not respond to brief efforts at establishing a beneficial 1:1 relationship. Our clinical team emphasized the need for Tony's placement in another facility after the consultation by Dr. Ehbrecht.

During the week of 6-17-76 Tony gave evidence of significant impulse control, was more cooperative with staff and the other residents, and was allowed a day visit with his prospective Big Brother. Tony had seven day passes off campus with his sponsor from April until the present.

SEP 27 1976

During the period of time of the 6-22-76 week Tony's aggressive and impulsive behavior lead to the administering of increased medication.

Tony was enrolled in an on-the-unit Boy Scout Troop around the latter part of June. He was eager to attend the meetings and was elected the Troop Leader.

During the week of July 22 a new treatment program was devised where Tony was given the choice of doing all required activities or being denied all on a daily basis. In other words, if Tony did not attend scheduled school he did not go swimming. This program has proved successful and is applied to all residents. Tony is responding to the consistent requirement that he go into the in-school suspension room and remain there until he completes his assigned task before going on to the next activity.

During the week of August 13 Tony for the first time began talking to therapists about his concerns, somewhat at a feeling and problem-solving level. Also, Tony was less disruptive and less threatening to others. Our Unit Physician, Dr. Jane Rivers, decided to decrease his large dosage of medication since Tony was rather sluggish and stiff. However, by the week of the 23rd there was a marked resurgence of aggressive and bullying behavior by Tony. For examples, he again hit, choked, kicked, cursed and showed little remorse. His medication was increased on 8-30-76. Currently Tony takes Haldol Concentrate 6 mg bid.

In summary, Tony still tends toward many inappropriate behaviors, aggression, rule breaking, property damage; still demands immediate gratification; still gives evidence of insufficient conscience; still lacks the development of a trusting human relationship.

RECOMMENDATIONS:

In terms of future treatment efforts it seems an emphasis on helping Tony respond in a trusting manner to one significant other may be a critical beginning point for other behavioral improvements. Also, Tony's therapist may find Tony needs to further work through his ambivalent feelings regarding his natural parents.

Since Tony enjoys participating in many recreational activities (such as sports and fishing) a management program may utilize this interest to achieve cooperative peer interactions and improved impulse control. Also Tony enjoys drawing as a self-expression. Perhaps these assets can be incorporated into a treatment approach.

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DATE

Peggy A. Swain, MSW, Social Worker

PATIENT SLIP

Re: William Anthony Lapham
Troup Co. Child

TO: Carole Walton

9-24-76

Intake Worker-Answerwater

This is all CSH had on Tony. The Social Worker at West Central Ga. is working on the summary which you requested.

_____ Necessary Action
_____ Note and Return
_____ Investigate and Report
_____ Signature
_____ As Requested
_____ For your Information
_____ Per Phone Conversation on _____
✓ Enclosed: Information which you requested from Central State Hospital.

From: Alatia W. Rayford
Casework Supervisor II

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CENTRAL STATE HOSPITAL

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PSYCHIATRIC EXAMINATION

STRUCTIONS: Include (1) Date, duration and circumstances of interview, (2) Patient's descripton, including appearance and tivity, (3) Interpersonal attitudes, (4) Speech and communication, (5) Affect, (6) Ideation, (7) Perception, (8) Orientation and mory, (9) Intellectual function, (10) Judgement and insight, (11) Provisional diagnosis.

DATE, DURATION AND CIRCUMSTANCES OF INTERVIEW: This examination took place in my office and several interviews were needed.

PATIENT'S DESCRIPTION, APPEARANCE AND ACTIVITY: Patient did not show any signs of anxiety like perspiration, moist hands, restlessness or being tense. Patient is an 11 years old boy who looks somewhat underdeveloped and undernourished who was wearing long dirty hair and was disheveled. Patient is missing the index finger on the right hand. According to the patient he lost it while mowing with his brother. He was not well groomed and his posture was relaxed. Conduct does not show tics or [illegible] mannerisms. He doesn't show compulsive or ceremonial acts and he was not combative or destructive. His facial expression is mobile.

INTERPERSONAL ATTITUDE: I consider that patient was cooperative and accessible. He talked the most he could about his problem. He was not evasive about his sexual problem. He did not go into explanation but he admitted sexual acting out in the group home for boys. Patient was not ingratiating. He was not aggressive.

AFFECT: Patient was able to show premative affect like rage, fear, anxiety. Also unpleasant affect, like hunger, thirst, loneliness. We could say that his affect was appropriate, emotion correlated with stimulus.

IDEATION: Content of thought, patient did not show systematized, grandiose or [illegible] delusions, ideas of reference, hypochondria, obsessions or phobias.

PERCEPTIONS: Illusions or hallucinations [illegible] not be detected.

ORIENTATION AND MEMORY: Patient was not [illegible] (con't)

[illegible] M. D.	DATE 7-30-75

LIPHAM, ANTHONY
[illegible] MH 3-28-[illegible]
3-7-[illegible] 151
UNIT: [illegible]'S BUILDING 1 SOUTH

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ORIENTATION AND MEMORY: con't

riented in time. He did know that the place was a hospital. He was oriented for person. Apparently his memory was perserved for recent and remote events.

INTELLECTUAL FUNCTION: Patient could read most of the things that I gave him to read. He stated that he hated his school teachers. His general information was very poor, to the point when asked about a city, to mention a river, his interpretation of proverbs was real poor.

JUDGEMENT AND INSIGHT: Ability to compare ideas, understand relations and draw correct conclusions was poor. He has some insight into his condition.

DIAGNOSIS: With the information we have on this boy, I think he has a behavior disorder like Unsocialized aggressive reaction of childhood. #308.4.
He has shown overt and covert, hostile disobedience. He has been quarrelsomeness, physical and verbal aggressive, vengeful, destructive, has had temper tantrums, solitary [illegible]

EXTERNAL PRECIPITATING STRESS: The poor environment with the two alcoholic parents, lack of parental discipline and moral values were apparently very low in this family. Could be interesting to know the family history. There are 12 brothers and sisters and to see how many of them have had problems.

PREMORBID PERSONALITY: Maybe being the son of two alcoholics, he has inherited something.

IMPAIRMENT: Moderate.

CENTRAL STATE HOSPITAL

CONSULTATION SHEET

QUEST - PARTS I, II AND III MUST BE COMPLETED BY REQUESTING PHYSICIAN

O.P.C. FROM: Children's DATE OF REQUEST: 4/25/75

REASON FOR REQUEST & PROVISIONAL DIAGNOSIS:
2y was kicked in his private by another P. P.C. revealed swelling on the right side of the scrotum.

RECEIVING FOLLOWING DRUGS: 1. Keflex 250 mg 2. Tylenol Elix 1 tsp q4h
3. [illegible] 4. Bactrim DS 1 tab BID
5. Stelazine 4/25 6.
End 4/26

PSYCHIATRIC SUMMARY: Tendencies Aggressive Reaction of Childhood

DOCTOR'S SIGNATURE: [signature] PLACE OF CONSULTATION: ☐ WARD ☒ OPD ☐ EMERGENCY ☐ ROUTINE

CONSULTATION REPORT

Slight pain on rt side (Lima Incident) No smell of secretion. No external injury present. Adv. pt for few more days. Return to OPC for recheck in 3 days - or sooner if necessary. [signature] 4-28-75

4-25-75 No complaints (no pain) Discharge

(Continued on reverse side)

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CENTRAL STATE HOSPITAL

RADIOGRAPHIC REQUEST AND REPORT

EXAMINATION REQUESTED | DATE

SUMMARY OF PERTINENT HISTORY - PHYSICAL FINDINGS AND ALL PROVISIONAL DIAGNOSES

M. D.

PREVIOUS X-RAYS YES NO

DATE OF LAST X-RAY

REPORT

CHEST: 3/7/75 Negative.

[signature]

Edward Clayton, M.D.

3/10/75 dictated and typed
bh

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3-7-75

CENTRAL STATE HOSPITAL
E.E.G. REPORT

March 14, 1975

IMPRESSION

METHOD: 22 electrodes in standard position. Good cooperation. Hyperventilation 3 min., good. Photic stimulation. On Medicine.

FINDINGS: Fairly well modulated average amplitude and well maintained Alpha of 8-9 cycles per second in all areas but maximal in parietal-occipital. Hyperventilation and Photic stimulation uneventful.

IMPRESSION: Normal EEG.

[redacted] M.D.
Physician (104)

[redacted]
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On Medicine Yellow 1

Good concentration

DATE 3-14-[redacted]

[redacted], Anthony
Case Nbr 205,853

[redacted]
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220

4 - C_4

4 - P_4

- O_2

3 - C_3

3 - P_3

- O_1

- C_z

- P_z

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SEP 2 7 197

Tony Lipham
Consultation - June 20, 1976

Dr. Mazur asked me to see this 11-year-old boy in consultation.

Tony Lipham was seen on 6-20-76 at West Central Regional Hospital. Tony is 11-years-old and gave his date of birth correctly as 8-26-63. Born at Columbus General Hospital. Tony is of the appropriate size according to his chronological age. When I asked for him he came out of his bedroom where he had been sleeping most of the Sunday. He was disheveled, somewhat sleepy but cooperative. He told me he spent one year at Central Hospital and Mr. Myers wants to take him home. He claims Mr. Myers is working at the adolescent unit and has children of his own age. He would rather go to a home than stay longer in the hospital. The boy is appealing but shows little affect and seems to be quite detached. He told me his parents got divorced. His mother still writes him. His father is in La-Grange and his has nine brothers and three sisters. He has been away from them since the age of nine and was in the 5th grade at school when he left. He can do simply arithmetic tasks: 5+6=11, 11+7=18, 11-6=5, 18-9=9. His general fund of information seems to be fair. There was no smile when he discussed this. He does not have a favorite book and he does not have a favorite T.V. story. The only thing he is afraid of is snakes. He claims that he sleeps during the day because he stays up too late at night, it is too noisy on the unit and he cannot sleep. He denies hearing any voices. There have been no bad dreams and no night-mares that upset him. He does not like the food here. He likes pizza and his mother sometimes got him pizza when he was still at home. I asked him what he wants to do later on and he said that he would like to be one of those people that come and work here, Meaning the aids at the children's unit. He has one friend only and that is John and he would like to have more friends. His only wish is to get out of here. He wants to go to a foster home and to a real school. He also wants to find his brothers and sisters. He claims that he has stayed so long at the hospital because he was so bad and he is convinced of this. He likes Mrs. Newman. She took him home. While he talks he lies back on the couch. His socks are torn and all of his toes look out. He told me that nobody buys clothes for him and he just has to wear what he has.

Diagnostic Impression: This is a typical picture of a very deprived child who is about to become institutionalized. He seems to have lost a great deal of interest in his environment and in life in general and merely conforms to demands made on him. In this case I would suggest to get him out of the institution at the earliest possible time and place him in some form of a group home where they could tolerate him. He is not suitable for a foster home at this point in time and he cannot be returned to his own family.

Diagnosis: Behavior disorder of childhood. Unsocialized aggressive reaction [illegible] personality disorder. Passive-Aggressive.

Martha E. Ehrenkranz, [illegible]

[illegible]
6-21-76

Anneewakee, Inc.

A NONPROFIT ORGANIZATION

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MEDICAL RECORD NO. L-536
LIPHAM, WILLIAM TONY MALE
TROUP CO. GA CS
LAGRANGE, GA
DOB 8-26-63 DOA 10-6-76

Anneewakee Treatment Center

4771 Anneewakee Road
Douglasville, Georgia 30135
404-942-2391

February 10, 1981

Ms. Dottie Henson
Troup County Department of Family and Child Services
P. O. Box 1265
LaGrange, Georgia 30241

Re: Tony Lipham

Dear Mrs. Henson:

Tony was admitted to Anneewakee Treatment Center on October 6, 1976. Upon admission Tony exhibited various symptoms that include: fighting with peers and adults, acting out behavior in the classroom, stealing, running away, sexual acting out towards younger boys and animals, speech problems, inability to verbalize, extreme impulsivity, and abusive language.

Tony has shown gradual progression toward eliminating maladaptive behaviors. There has been no evidence of sexual acting out or cruelty to animals. Tony expressed ideas more clearly and in a more coherent manner. However, he has difficulty in discussing deep feelings and verbalizing insecurities. Tony behaves in a respectful and cooperative manner in the classroom and has maintained an overall "B" average in his coursework. At this time he requires much attention and reinforcement from educational staff.

Tony relates more appropriately to authority figures, but is often argumentative and antagonistic with staff. Tony sometimes requires strict supervision from his group leaders to remain on task during group activities.

Impulse control continues to need improvement as evidenced by Tony leaving the group without permission and by some angry outbursts. Therapeutically, Tony is working [illegible] aggressive aims that are often seen when a student re-enters the formal classroom setting. This is a time for Tony to re-work and internalize [illegible]

Tony exhibited some gains in maturity level during a home visit with [illegible] in December. The brother was reportedly involved in some drug related activities [illegible] visit and made the decision that he would not like to visit there again. He

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Ms. Dottie Henson
Troup County Department of Family and Child Services
P. O. Box 1265
LaGrange, Georgia 30241

Re: Tony Lipham

was able to verbalize some feelings of sadness over breaking this tie with his family, but also stated that he felt good about the decision. The staff has made arrangements for visits with other people that are more beneficial.

The overall treatment goal for Tony is to develop social skills and assurance in social situations, as well as for him to attain vocational and educational skills sufficient to assure success in an independent living setting. The Supervisory Clinical Team projects that this goal could be realistically attained by February of 1982.

If we can be of further assistance, please feel free to contact us again.

Sincerely,

Charla Weins

Charla Weins, MA
Social Services

ja

MEDICAL RECORD NO. L-536
LIPHAM, WILLIAM TONY MALE
GROUP CO. CASES
LAGRANGE, GA
DOB 8-26-63 DOA 10-6-76

PSYCHOLOGICAL EVALUATION

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TONY LIPHAM

AGE: 13 Years

October 14, 1976

Tests Administered:
Wechsler Intelligence Scale for Children (Revised)
Draw-A-Person Test
Bender Visual Motor Gestalt Test
Rorschach Psychodiagnostic Test

INTRODUCTION

Tony is a 13 year old young man who is being evaluated for a possible admission to the Annewakee Treatment Center. He states that he was in the fifth grade before coming to Annewakee. Tony has a long history of institutionalization before coming to Annewakee. His mother and father have been separated for sometime, both living apart and seeing Tony with a frequency of about once a year. Tony is very vague when questioned about his family relationships. He apparently lost his index finger when he was a young child in an accident with a lawn mower. Tony apparently does not have a home or relatives to take care of him.

In the testing interview, Tony was cooperative, well-mannered and did not give the examiner any undue difficulties. Tony states that he has had psychological tests on numerous occasions prior to coming to Annewakee. It is this examiner's opinion that the present battery of psychological tests are an accurate reflection of Tony's present personality organization.

INTELLECTUAL EVALUATION

Tony was administered the Wechsler Intelligence Scale for Children (Revised) in order to gain a measure of his general mental ability. On this instrument, he earned a verbal scale IQ of 75, a performance scale IQ of 104 and a full scale IQ of 87. This would classify his tested general mental ability within the low-average range and rank his tested general mental ability at the 21st percentile of the general population. A summary of Tony's scaled scores on the various sub-tests of the Wechsler Intelligence Scale for Children (Revised) is as follows:

VERBAL		PERFORMANCE	
Information	5	Picture Completion	13
[illegible]	7	Picture Arrangement	7
[illegible]	4	Block Design	[illegible]
Vocabulary	3	Object Assembly	[illegible]
Comprehension	8	Coding	9

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MEDICAL RECORD NO. A-936
LIPHAM, WILLIAM TONY MALE
TROUP CO. OFACS
LAGRANGE, GA
DOB 8-26-63 CCA 10-6-76

Tony shows a definite preference for dealing with the world at a perceptual-motor level rather than the verbal level. It should be borne in mind that on the Wechsler Intelligence Scale for Children (Revised) average range scores run between eight and twelve. All of Tony's performance sub-tests are at or above his verbal sub-tests. His highest sub-test scores indicate superior ability to reproduce familiar forms and a superior ability to be alert to small details. His lowest sub-test score indicates a retarded level of vocabulary development. Tony shows a moderate impairment in the development of visual-motor skills and a general emotional immaturity. This examiner would conclude that Tony is of dull-normal intelligence with a marked lack of development of basic academic skills.

PERSONALITY EVALUATION

Tony does not show any remarkable evidence of a psychotic organization to his personality. He does show pathological anxiety, emotional blunting, a deep overpowering need for nuturance and protection, strong aggressive feelings, which are not acted out and a somewhat apathetic approach to life. Psycho-dynamically, Tony appears to be a young man whose lack of adequate parenting has deprived him of a significant amount of intellectual and emotional development. He is basically an outgoing, friendly individual who is clumsy in expressing his needs and in effecting positive interpersonal relationships. He has a poor self-concept and constantly depreciates himself and takes a passive position when challenged. He has a long history of disappointments and placements in institutions. The diagnostic formulation would include an Anxiety Neurosis (300.0) and an Overanxious Reaction of Adolescence (308.2).

TREATMENT RECOMMENDATIONS

Tony is a 13 year old young man who has been placed in several institutional settings, having been abandoned by his parents. He shows a basic, outgoing, happy temperament which has been blunted through many disappointments and deprivation. The Annewakee Treatment Program can provide Tony with an adequate psychotherapeutic plan of management to help him begin to feel more safe, secure and loved. This will lead him to the development of his intellectual and emotional potentials, so that he can become a positive, self-sufficient young man. Tony will require several years of active treatment if he is to begin to significantly profit from treatment.

[redacted]
Clinical Psychologist
Ga. License 164

MEDICAL RECORD NO. A-936
LIPHAM, WILLIAM TONY MALE
TROUP CO. OFACS
LAGRANGE, GA
DOB 8-26-63 CCA 10-6-76

March 18, 1976

Mr. Jim Byce, SSD
Department of Human Resources
136 Main Street- Broome St. Entrance
LaGrange, Georgia 30240

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Re: William Anthony (Tony)Lipham
W/M. b. 8-26-63

(Troup County Child in CCA Unit
at West Central Ga. Regional Hosp

Dear Mr. Byce:

I am writing to give you updated information on the above-named child for whom we have already requested your assistance in making p. cement plans. On 3-16-76, Tony's therapist at CCA, Mrs. Jean Newman, called to tell me about recent problems with Tony. Tony's behavior has deteriorated badly, especially in his relationships with other children in the CCA Unit. He is constantly picking on the other childre and is so obnoxious to them that the staff has had to intervene constantly to prevent older and bigger children (Tony is very small in physical stature for his age of 12 years) from doing physical harm to Tony. Tony has been using very bad and vulgar language constantly with the other children and with the staff. He is hostile toward everyone and does not respond to positive rewards or seem concerned when he misses out on all the activities of the other children because of his bad behavior.

Prior to Tony's removal from the Anne Elizabeth Shepherd Home in Columbus, he was causing a severe problem with his sexual acting out. He was making advances to the other boys, to the girls, was involved in sexual activities with animals, and was reported to have engaged in oral sex with an older man in the community in return for gifts and money. Tony's sexual acting out has now become a serious problem at the CCA unit. There is one innocent and naive boy in the Unit. Tony has made threats about what he is going to do to this boy, if the boy doesn't start engaging in sexual activities and Tony now has the other child terrified of him.

Tony has had many things given to him since he has been in the CCA Unit. Various staff members have bought him toys, clothes, and other gifts. A volunteer group in LaGrange sends Tony money regularly and

Letter to:

Mr. Jim Byce, SSD
Department of Human Resources
136 Main St.- Broome St. Entrance
LaGrange, Georgia 30240

Re: William Anthony (Tony)L
W/M, b. 8-26-63

(Troup County Child in C&A
at West Central Ga.Regiona

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March 18, 1976 (continued):

purchases clothing or shoes that he may need. Tony appreciates none of this, does not take care of his things, tears his clothes and toys up or throws them away, is never satisfied with what he has, always wants to trade it for something else, and then is not satisfied with that either. He constantly expects things to be handed to him and always wants more money, more clothes, etc.

The staff at C&A are beginning to feel that Tony will turn out to be a sociopath. They have tried many different treatment programs with him and nothing seems to work. Tony has made no measurable progress since his placement in the Columbus C&A Unit; in fact, he is in worse shape than when he was transferred from Milledgeville C&A to Columbus C&A. The staff at C&A are ready to give up on Tony and want to place him back in some community facility. The only recommendation they can make is a specialized foster home possibly in the country and with no other children.

On 3-17-76, Sam Kelly, Director of the Columbus C&A Unit, called to say that Tony's name has been put on a list of children who should be moved from the hospital. This list has been sent to Dr. Philly, State C&A Coordinator. Mr. Kelly stated that a deadline of April 1, 1976, has been set for Tony's removal from C&A and that this deadline can only be extended for a week or two, even if we are not able to make other placement plans for Tony. I told Mr. Kelly that I strongly disagree with this decision, as I do not feel that there is any less restrictive environment than the hospital for Tony. We have tried foster homes, a group home designed to meet emotionally disturbed children, and have doubts that even a specialized foster home is the answer for Tony, even if one were available. We do not think that Tony would fit in any home where there are other children, as his abusive, destructive, hostile, unmanageable, sexuallly exploiting behavior would have very bad effects on any other child he comes in contact wi There are probably not many adults who could tolerate Tony's behavior either.

The situation with Tony's natural family is as follows. We do no know where his natural mother is. She has not seen Tony more than one or two times since his placement in foster care almost three and one half years ago. Tony's mother has no interest in him or her other children and cannot be motivated to even keep up regular contact with them. Tony's father is 57 years of age, is in poor health due to year of heavy drinking and smoking. Mr. Lipham lives with an alcoholi girlfriend who refuses to have anything to do with the children and w

Letter to:

Mr. Jim Byce, SSD
Department of Human Resources
136 Main St.-Broome St. Entrance
LaGrange, Georgia 30240

Re:Wi .iam Anthony (Tony)Lipham
W/M, b. 8-26-63

(Troup County Child in C&A Unit
at West Central Ga.REgional Hos

March 18, 1976 (continued):

recently refused to have one of the older, more normal children stay temporarily with them for one week. Tony's oldest brother. Richard, would not even consider the placement of Tony with him. Shirley Gay, Tony's oldest sister, would be willing to take Tony, but she cannot even adequately care for her three young children and has been a Fulton County protective service case. There are no other relative possibilities for Tony.

I am very upset about the situation of this child and very concerned about future plans for him. Any assistance you can give will be greatly appreciated.

Sincerely,

(Ms.) Dottie W. Ragland
CaseworkeSupervisor II

(Mrs.) Elizabeth H. Abercrombi
Director III

DWR:gcr

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IN THE SUPREME COURT

FOR THE

STATE OF GEORGIA

WILLIAM ANTHONY LIPHAM, Appellant

Vs.

THE STATE OF GEORGIA, Appellee

ON INITIAL APPEAL

FROM THE SUPERIOR COURT OF COWETA COUNTY

BRIEF OF APPELLANT

FANNING & HUDSON, P.C.,

Steven E. Fanning & Ike Hudson, Attorney for Appellant

P.O. Box 668

Newnan, Georgia 30264-668

(404) 253-8484

Respondent's Exhibit A

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UNITED STATES CONSTITUTION

SIXTH AMENDMENT 9, 15, 17

FOURTEENTH AMENDMENT 17

GEORGIA CONSTITUTION

ARTICLE 1, SECTION 1, PARAGRAPH 14 9

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157 Ga. App. 494 (1981)

OTHER AUTHORITIES CITED

77 CJS 457, Robbery Section 11 (1952) 14

ABA STANDARD 13 - 3.1 15

JURISDICTIONAL STATEMENT

The Supreme Court of Georgia has jurisdiction over this appeal as it involves a sentence of death reviewable in accordance with Georgia Laws 1973 p.159, Section 4 (O.C.G.A. 17-10-35) and issues over which the Supreme Court of Georgia has original jurisdiction under Article 6, Section 6, Paragraph 2 of the Constitution of the State of Georgia.

ENUMERATION OF ERROR

1. The Trial Court erred by impermissably entering the attorney-client relationship between the Appellant and Counsel by dictating which Counsel would serve as lead counsel in the case.

2. The Trial Court erred in failing to direct a verdict of acquittal at the conclusion of the State's case.

3. The Trial Court erred in failing to grant Appellant a change of venue.

4. The Trial Court erred in failing to grant Appellant's motion to seven counts in the Indictment.

5. The Trial Court erred in placing upon Appellant Grand and Traverse Juries selected from Jury Lists which failed to contain a representative cross-section of persons in certain significant, indentifiable classes.

6. The Court erred in failing to declare a mistrial as to sentencing upon the improper and inflammatory argument of the prosecutor.

STATEMENT OF FACTS

On the morning of December 5, 1985, a call was received at the Coweta County Sheriff's Department advising that a homicide had been discovered at the home of Kate Furlow on Highway 16, Coweta County, Georgia. The call was answered by Agent Charles Stone of the Georgia Bureau of Investigation and Sheriff Larry Hammett, Sheriff of Coweta County, Georgia (T-228). Upon arrival at the Furlow home, Agent Stone found the house to be in disarray (T-239) and located the body of Kate Furlow lying crossways across her bed, with her legs spread apart approximately two feet apart and with a gunshot wound to her left temple (T-231, 232, 233). An investigation team from the Georgia State Crime Lab was called in to collect potential evidence for later scientific evaluation (T-239, 240). Agent Stone and his staff conducted interviews of persons in the surrounding area and through his interview with Mrs. Sybil Laurent, obtained an artist sketch of an individual who had been seen at the Laurent home at approximately midnight to one o'clock on the morning of December 5, 1985 (T-235). At the same time this investigation was being conducted, several telephone calls were received by Investigator George McGhee of the Coweta County Sheriff's Department from Mr. Ronnie Simon and Ms. Susan Hardy (T-236). Agent Stone was

advised in his interview with these individuals that the Appellant had been at the Simon trailer in Quail Hollow Trailer Park on the evening of December 4, 1985; had ridden around in an automobile with Mr. Simon and had been let out by Mr. Simon on Highway 16 at the Blue Flame Gas Company, in close proximity to the home of the victim and had left a bag at the Simon's residence (T-192). Further, Mr. Lipham had been seen on previous occassions with a .25 caliber automatic pistol in his possession (T-196, 197). Based on these interviews, Agent Stone interviewed Appellant's wife, Janie Gore Lipham, and learned that Mr. Lipham had sold a .25 caliber pistol to his brother Roy Lipham in LaGrange (T-237). Agent Stone recovered said pistol from Appellant's brother. The pistol was turned over to Mr. Kelly Fike of the Georgia State Crime Lab who conducted ballistics tests on the .25 caliber pistol along with a slug which had been recovered from the home of Kate Furlow (T-335, 336). Based upon recovery of the .25 caliber pistol and items allegedly taken from the Furlow home, Agent Stone caused an arrest warrant to be issued for Appellant charging him with the Murder of Kate Furlow (T-239).

On January 14, 1986, Defendant was located and arrested at a motel in Douglasville, Georgia (T-239). Mr. Lipham was fingerprinted and his prints were compared to latent prints

recovered by the Georgia State Crime Laboratory Investigative Team with negative results (T-348).

Pursuant to a Court Order, Agent Stone obtained head hair and pubic combings from the Appellant and submitted these to the Georgia State Crime Laboratory (T-269, R-5, R-7). These were compared with various hair samples recovered from the Furlow home and while several hair samples could not be identified as coming from either Appellant or Mrs. Furlow, a single pubic hair recovered from Mrs. Furlow's bedroom contained sufficient characteristics to be compatible with the pubic hair of the Appellant (T-307).

On June 3rd, 1986, the Grand Jury for the March term 1986 of the Coweta County Superior Court returned indictment number 5960, page 161 charging the Appellant, WILLIAM ANTHONY LIPHAM, with the offenses of Count I: Murder (O.C.G.A. 16-5-1); Count II: Rape (O.C.G.A. 16-6-1); Count III: Armed Robbery (O.C.G.A. 16-8-41); and Count IV: Burglary (O.C.G.A. 16-7-1) (R-13).

Trial was held on the aforementioned Indictment in the Superior Court of Coweta County on February 9th, 1987, before the Honorable William F. Lee, Jr., Judge. In this trial the State sought the penalty of Death with respect to Count I. At the conclusion of the aforestated Trial, the Appellant was found guilty on all Counts (T-467, 468, R-192). A sentencing phase of

the Trial was then held under which the Jury found aggravating circumstances and recommended the imposition of a sentence of Death for Count I (T-542, 543, R-201). Appellant was sentenced to Death under Count I; Life imprisonment under Count II to be served consecutively to the sentence imposed in Count I; Life imprisonment on Count III to be served consecutively to the sentence imposed in Count II; and twenty years imprisonment on Count IV to be served consecutively to the sentence imposed in Count III (T-548, 549, 550, R-203).

A Motion for a New Trial was filed on February 20, 1987, and heard before the Honorable William F. Lee, Jr., on June 25, 1987, at which time the Motion for New Trial was denied on all grounds. (R-207, 211, 212)

The instant appeal follows pursuant to the Sentence Review Provisions of Georgia Laws 1973, page 159, Section 4 (O.C.G.A. 17-10-35) and Notice of Appeal filed on July 16, 1987. (R-1)

ARGUMENT AND CITATION OF AUTHORITIES

I.

DID THE TRIAL COURT ABUSE ITS DISCRETION IN PRECLUDING MR. MICHAEL DOWD, A MEMBER OF THE NEW YORK STATE BAR, FROM REPRESENTING THE APPELLANT? (E-1)

Shortly after Appellant's arrest, Ms. Blanchette Holland, Esquire, a member of the Georgia State Bar was appointed by the Honorable William F. Lee, Jr., Judge of the Superior Court of Coweta County, Georgia, to represent the Appellant. Due to a feeling on the part of Ms. Holland that her lack of experience in defending Criminal cases and specifically cases under which the State sought the Death Penalty, she filed a Motion to Withdraw as Attorney of Record for Mr. Lipham or in the alternative to appoint Co-counsel to assist her in his defense. This Motion was granted on November 6, 1986, by Judge Lee subsequent to his orally appointing Mr. Steven E. Fanning, Esquire, also a member of the Georgia State Bar to represent Mr. Lipham. (Transcript of Hearing September 11, 1986, pages 18-23; Transcript of Hearing November 6, 1986, pages 2-5) Prior to Mr. Fanning's appointment and subsequent to his receiving Ms. Holland's Motion, Judge Lee sought to locate an attorney to represent Mr. Lipham. Prior to

Mr. Fanning's appointment, Mr. Michael Dowd, a member of the New York State Bar, contacted the Defendant and agreed to represent him on a Pro Bono basis.

On January 14, 1987, the date and day designated for Hearing of Motions in Appellant's case, Mr. Fanning introduced Mr. Dowd to the Court (Transcript of Hearing, January 14, 1987, page 5). Prior to this introduction, Mr. Dowd had in fact worked with Mr. Fanning in interviewing various State's witnesses including witnesses from the Georgia State Crime Laboratory. Judge Lee indicated that a written Motion to enter the case Prc Hac Vice would not be required; however, Mr. Dowd would not be able to act in the capacity of lead counsel (Transcript of Hearing, January 14, 1987, pages 3-6). Mr. Dowd raised the question as to whether or not under the Sixth Amendment of the United States Constitution, Mr. Lipham had the right to make the determination of who would be lead counsel in his case once Mr. Dowd had been admitted to represent the Appellant Pro Hac Vice (Transcript of Hearing, January 14, 1987, pages 6, 13-14). The Court repeatedly advised Mr. Dowd that he would be allowed to enter the case Pro Hac Vice, but that the Court would not allow him to act in the capacity of lead counsel. Rather he would be allowed only to assist appointed counsel and would perform in such capacities as appointed counsel designated.

Mr. Dowd made a showing to the Court of his credentials and experience in the defense of Criminal cases. Although the State of New York does not have a Death Penalty, Mr. Dowd had been involved in numerous felony cases involving drugs and attempted murders of police officers which are of the same genre as the instant case. Further Mr. Dowd testified that he had been a special professor of Law at Hofstra Law School and was at the present time an adjunct professor at Emory Law School in Atlanta where he had been a member of the Trial Advocacy Program for approximately five years and was familiar with Georgia Practice (Transcript of Hearing, January 14, 1987, pages 12-14). The Court continued to refuse to grant Mr. Dowd's Motion to enter the case Pro Hac Vice without limitation (Transcript of Hearing, January 14, 1987, page 23).

It is well settled and Appellant fully recognizes that members of the Bar of various states have no Federal Constitutional Right to appear Pro Hac Vice in States where they are not licensed to practice law Leis V. Flynt, 439 U.S. 438, and further that although Appellant is guaranteed the right of counsel by both the Sixth Amendment to the United States Constitution and Article One, Section One, Paragraph Fourteen of the Georgia Constitution, he has no guarantee that he can be represented by out-of-state counsel. This issue was addressed in

the case of Williams Vs. The State, 157 Ga. App. 494 (1981) under which Judge Birdsong writing for the Court held that the Trial Court in that case did not abuse its discretion in refusing to allow a member of the Texas State Bar from representing the Appellant. The basis for this opinion was the fact that the attorney seeking to enter the Williams case Pro Hac Vice failed to offer any proof of his Bar admission in Texas or to show that he was qualified and ready to appear Pro Hac Vice. This is not the Instant action as Mr. Dowd fully set forth his admission to the New York State Bar and his credentials and ability to enter the case Pro Hac Vice and fully represent the Appellant. While Appellant fully recognizes the right of the Trial Court to consider the credentials of out-of-state counsel and to consider the relative credentials of appointed counsel as an exercise of discretion in determining the admission of an out-of-state attorney Pro Hac Vice, Appellant urges upon this Court that the Trial Court did in fact exercise its discretion and allowed Mr. Dowd to enter the case Pro Hac Vice. The abuse of discretion comes in the Trial Court imposing its will upon Appellant's Counsel and Appellant in determining who would be lead counsel in the Trial of the case. In Fortson V. State, 240 Ga. 5 (1977), the Court stated that "decisions on which witnesses to call, whether and how to conduct crossexaminations, what Jurors to

accept or strike, what trial motions should be made, and all of the strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client." As between two counsel representing a single Defendant, the final determination of these various trial functions would be the responsibility of lead counsel. It would thus seem that the Trial Court, after admitting Mr. Dowd to enter the case Pro Hac Vice, made an impermissible and unwarranted invasion of the Attorney/Client relationship by making for the Appellant the determination of which Counsel would serve as lead counsel in the Defense of his case.

II.

DID THE TRIAL COURT ERR IN FAILING TO GRANT A DIRECTED VERDICT OF ACQUITTAL AT THE CONCLUSION OF THE STATE'S EVIDENCE? (E-2)

Pursuant to Georgia Law of 1982, Page 3, Section 17 (O.C.G.A. 17-9-1 (a)):

> "Where there is no conflict in the evidence and the evidence introduced with all reasonable deductions and inferences therefrom shall demand a verdict of acquittal or "not quilty" as to the entire offense or to some particular count or offense, the court may direct the verdict of acquittal to which the defendant is entitled under the evidence and may allow the trial to proceed only as to the counts or offenses remaining, if any."

Two of the offenses with which Appellant was charged consist of the offense of Armed Robbery and the offense of Rape.

It is essential to a conviction for the offense of Rape that carnel knowledge of a female is done forcibly and against her will (O.C.G.A. 16-6-1). It is therefore axiomatic that the female upon which the offense is perpetrated must be a living human being at the time sexual intercourse takes place. Under the evidence presented by the State in Appellant's case, there is a conflict existing as to whether or not sexual intercourse took place. This arises from the fact that the large quantity of fluid found in the vagina by Dr. Kenneth Alonso during his autopsy of the victim could not be identified. In any event, it was the opinion of Dr. Alonzo that sexual intercourse did take place. He based his opinion upon the position of the deceased's body and upon the presence of this unidentified fluid. It should be noted that at no point in Dr. Alonso's testimony did he establish the time of death of the deceased (T-253, 293, 294-299). In the case of Gibson V. Jackson, 443 Fed. Sup. 239 (1977), Middle District of Georgia at 246 and 247, Judge Owens addressed himself to this point. He held that it "must be established that the victim was a living human being at the time intercourse or penetration took place; otherwise it is not a rape". It would seem to follow that not only must the State

establish that penetration or sexual intercourse took place, it must also affirmatively establish that the victim was alive at the time of said intercourse or penetration. Not only is the record totally silent on the question of whether or not the victim was alive at the time the alleged carnel knowledge took place, it was affirmatively demonstrated through testimony of various State witnesses that there did not exist any other evidence of force with respect to the alleged rape of the victim. This being the case, Appellant contends that an essential element of the offense of Rape; to wit, the alleged carnel knowledge took place by force and without the consent of the victim, has not been established by the State and the Trial Court should have granted his Motion for a Directed Verdict as to this Count.

Similarly and with respect to the charge of Armed Robbery, it was incumbent upon the State to prove by competent evidence that the Appellant took certain items of property from the victim or her immediate vicinity by use of an offensive hand gun; to wit, a hand gun.

In the case of Dixon V. Hopper, 407 Fed. Sup. 58, the United States District Court for the Middle District of Georgia, held that although evidence of a gun being present at the time of the alleged offense was produced, there was no evidence that the gun was used to take the property in question and an Armed Robbery

was not perpetrated. In order for an Armed Robbery to take place, force and fear must precede or be contemporaneous with the taking, 77 CJS 457, Robbery Section 11 (1952) and Hicks V. State, 232 Ga. 393, at page 403. In the instant action, the record at the close of the State's evidence, not only failed to establish that a hand gun had been utilized in the taking of the deceased's property, but had failed to even show that a hand gun was present at the time of the taking of the deceased's property. For this reason, Appellant urges that the State has failed to prove an essential and material element of the crime of Armed Robbery and that upon the conclusion of the State's evidence, the Trial Court should have granted a Directed Verdict to this Count.

III.

THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR CHANGE OF VENUE PURSUANT TO A SHOWING OF SOME EIGHTY PERCENT (80%) OF PROSPECTIVE JURORS HAD SOME PRIOR KNOWLEDGE OF THE FACTS AND CIRCUMSTANCES OF THE CASE. (E-3)

Appellant contends that he was entitled to a change of venue after Voir Dire of prospective Jurors revealed that approximately eighty percent (80%) of these Jurors had prior knowledge of the case (T-118-120).

The standards governing a change of venue are derived from

the Fourteenth Amendment's due process clause which enforces a Defendant's right to be tried by "a panel of impartial, indifferent Jurors" under the Sixth Amendment to the United States Constitution. Irwin V. Dowd, 366 U.S. 717 at 722 (1961). At issue is the fundamental fairness of Defendant's trial. Murphey V. Florida, 421 U.S. 794 (1975).

Although all Jurors in the instant action were questioned as to whether their prior knowledge would affect their ability to serve and all responded in the negative, the questioning was couched in general and conclusory terms and did not reach the level of discovery of actual prejudice or the effect of such prejudice. Calley V. Caldwell, 519 F2d 184 (Fifth Cir. 1975).

This method of examination coupled with the high incidence of prior knowledge of the case by prospective Jurors resulted a denial to Appellant of fundamental fairness in his trial.

IV.

UPON MOTION BY APPELLANT, SHOULD THE TRIAL COURT HAVE SEVERED THE VARIOUS COUNTS OF THE INDICTMENT? (E-4)

In the case of Dingler V. State, 233 Ga. 462 (1975), the Georgia Supreme Court adopted ABA Standard 13-3.1 which reads in part:

Severance of Offenses:

(b) the Court, on the application of either the Prosecuting Attorney or the Defendant, should grant a severance of related offenses: (i) before Trial, whenever severance is deemed appropriate to promote a fair determination of the Defendant's guilt or innocence of each offense; or (ii) during Trial whenever upon the consent of the Defendant or upon a finding of manifest necessity, severance is deemed necessary to achieve a fair determination of the Defendant's guilt or innocence of each offense.

(c) on evaulating whether severance is 'appropriate to promote' or 'necessary to achieve' a fair determination of the Defendant's guilt or innocence for each offense, the Court should consider among other factors whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the tryer of fact will be able to distinguish the evidence and apply the Law intelligently as to each offense.

In the instant action, the entire State's case concerning the offenses of Murder, Rape, and Armed Robbery consisted of circumstantial evidence from which the Jury was asked to infer many of the material elements of the offenses charged. Proof by circumstantial evidence, by its very nature, requires the utilization of numerous witnesses who supply information in an attempt to establish facts from which the aforestated inferences

can be drawn. As a practical matter, once the Jury commences to draw prejudicial inferences against the Defendant from facts presented, there is a tendency to make assumptions without requiring underlying fact. By way of example and in the case of the charge of Rape, the repeated showing to the Jury of the position of the body of the deceased and her state of undress would lead the Jurors to reach a conclusion that a Rape had occurred without analyzing or determining whether facts existed to support the various elements of the offense charged. Once such inferences and/or conclusions were drawn by the Jury, concluding in a belief in the Guilt of the Defendant of that charge, the Jury would dispense with the neccessity of competent evidence to establish Defendant's guilt as to the remaining charges. Under the circumstances, the "flow over" effect of trial on multiple charges rendered it impossible for the Appellant to receive full and fair consideration of the evidence by the Jury with respect to each count of the Indictment.

V.

WAS APPELLANT DENIED HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY HAVING PLACED UPON HIM GRAND AND TRAVERSE JURY LISTS WHICH DID NOT INCLUDE A FAIRLY REPRESENTATIVE CROSS SECTION OF THE INTELLIGENT AND UPRIGHT CITIZENS OF COWETA COUNTY, GEORGIA. (E-5)

Georgia Laws 1978-79, page 27, section 2 and as amended (O.C.G.A. 15-12-40) requires in part:

JURY LISTS; COMPILATION AND REVISION; PROCEDURES:

(a) Nonmechanical method of selection:

(1) At least biennially, or, if the chief judge of the superior court shall direct, at least annually, the board of jury commissioners shall compile, maintain, and revise a jury list of intelligent and upright citizens of the county to serve as jurors. In composing such list the commissioners shall select a fairly representative cross section of the intelligent and upright citizens of the county from the official registered voters' list of the county as most recently revised by the county board of registrars or other county election officicals. If at any time it appears to the jury commissioners that the jury list, so composed, is not a fairly representative cross section of the intelligent and upright citizens of the county, they shall supplement the list by going out into the county and personally acquainting themselves with other citizens of the county, including intelligent and upright citizens of any significantly identifiable group in the county which may not be fairly represented on the jury list.

(2) After selecting the citizens to serve as jurors, the jury commissioners shall select from the jury list a

sufficient number of the most experienced, intelligent, and upright citizens, not exceeding two-fifths of the whole number, to serve as grand jurors. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of trial jurors for the county, except as otherwise provided in this article, and no new names shall be added until those names originally selected have been completely exhausted. However, when a name which has already been drawn for the same term as a grand juror shall also be drawn as a trial juror, such name shall be returned to the box and another name shall be drawn in its stead.

In the instant action, the Grand and Traverse Jury lists placed upon the Appellant were composed and certified on July 25, 1984, approximately two and one-half years prior to Appellant's trial (Transcript of Hearing, January 14, 1987, page 40). The lists were therefor stale at the time of Appellant's trial and the Jury commissioners of Coweta County were in the process of compiling new lists.

Utilizing the statistics contained in State's exhibit No. 2 to Defendant's Motion to Challenge the Array of the Traverse Jury and Plea in Abatement to the Array of the Grand Jury (Transcript of Hearing January 14, 1987, P. 107-110), the two Jury lists appear on their face to accurately reflect a representative cross

section of the community with respect to females and blacks; to wit, while females make up fifty-three percent (53%) of the eligible population in Coweta County, fifty-four point seven percent (54.7%) of the Grand jury list and fifty-three (53%) percent of the Traverse Jury list is composed of females. While blacks constitute twenty-four percent (24%) of the population of Coweta County, twenty-three point six percent (23.6%) of the Grand jury list and twenty-two point seven percent (22.7%) of the Traverse jury list is composed of blacks. Closer scrutiny of these statistics, however, reveals that while females constitute fifty-three percent (53%) of the population of Coweta County eligible for inclusion on the jury lists, only nineteen point two percent (19.2%) of those eligible are contained on the Traverse jury list and four point nine percent (4.9%) of those eligible are included on the Grand jury list. With respect to blacks, while Twenty-four point nine percent (24.9%) of the eligible population of Coweta County for inclusion on the Grand and Traverse jury lists are black, four point five percent (4.5%) and seventeen point five percent (17.5%) of those eligible to serve are represented on the Grand and Traverse jury lists respectively. These disproportionate figures result from the fact that the jury commissioners utilize only the registered voters list from the last general election without

supplementation prior to the complication of the Grand and Traverse jury list (Transcript of Hearing, January 14, 1987, P. 43). This source automatically excludes significant numbers of eligible persons in Coweta County from being considered for potential inclusion on the jury list. In 1985, documentation from the office of the Georgia Secretary of State indicated that with respect to blacks, the registered voters list of Coweta County contained only forty point nine one percent (40.91%) of the black population of Coweta County, eighteen years of age or over (Transcript of Hearing January 14, 1987, P. 59). This indicates that fifty-nine point zero nine percent (51.09%) of that class are automatically excluded from jury consideration as not being listed on the registered voters list. As testified to by a Jury Commissioner, once the Grand and Traverse Jury lists for Coweta County were compiled in July of 1984, no efforts were made whatsoever to supplement the lists. While Appellant recognizes that there is no requirement that a jury list include the name of every citizen of the county eligible for jury service, the list must include a fair cross section of the eligible members of the community Ingram V. State, 253 Ga. 622 (1984). Appellant submits that the percentages of blacks and women included on the Grand and Traverse Jury lists of Coweta County are so disproportionate when compared with the precentage

composition of blacks and females in the total eligible population in Coweta County that they do not accurately represent a fair cross section of those eligible for jury service in Coweta County, Georgia.

VI.

WERE THE REMARKS OF THE PROSECUTOR IN HIS CLOSING ARGUMENT DURING THE SENTENCE PHASE OF APPELLANT'S TRIAL SO INFLAMMATORY AND PREJUDICIAL TO THE MINDS OF THE JURORS AS TO REQUIRE REVERSAL OF THE DEATH SENTENCE? (E-6)

In making his closing argument in the Punishment Phase of the Appellant's trial, the prosecutor stated "Forgive him. I'll say to you, that's fine, but you don't have that right. I'll tell you who has that right to forgive. Kate Furlow has the right to forgive him. God has the right to forgive him. You don't." (T-519) This statement by the District Attorney was a patent misstatement of the existing law within this state in that the jury, even though finding one or more aggravating circumstances authorizing the imposition of the Death Penalty may recommend a sentence of life imprisonment. Davis V. State, 241 GA. 376 at 385 (1978), Fleming V. State, 240 GA. 142 at 146 (1977), Redd V. State, 240 GA. 753 (1978). The Trial Court recognized immediately the improperty of this argument and

instructed the Prosecutor not to use this argument in the future. The Trial Court further instructed the jury that the argument was improper and not a correct statement of the law. Following the conclusion of the closing argument, the Appellant moved for a mistrial based upon the aforestated improper argument which was denied by the Court. (T-521, 522 & 530) The Appellant contends that this argument coupled with the exhortations of the Prosecutor for the jurors to place themselves in the position of the victim, so poisoned and inflamed in the minds of the jurors as to render it impossible to them to return a verdict solely on the evidence presented in the case. While curative instructions were issued by the Court concerning this argument, they were insufficient to eliminate the prejudice and harm done by the argument and Appellant's motion for Mistrial should have been granted.

CONCLUSION

For the reasons set forth above, Appellant contends that the trial of his case was not conducted in accordance with the rights afforded him under the Sixth and Fourteenth Amendments to the United States Constitution and the Constitution and Laws of the State of Georgia and should be reversed.

Respectfully submitted,
FANNING & HUDSON, P.C.

Steven E. Fanning

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing by depositing a copy of the same in the United States mail with sufficient postage affixed upon:

Mr. William G. Hambrick, Esquire
District Attorney, Coweta Judicial Circuit
P.O. Box 1918
Newnan, Georgia 30264

and

The Honorable Michael J. Bowers, Esquire
Georgia Attorney General
132 State Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

This 17th day of August, 1987.

FANNING & HUDSON, P.C.

By: _____
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ORIGINAL NO. 87-6987

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

WILLIAM ANTHONY LIPHAM,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

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SUPREME COURT, U. S.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Should this Court consider the Eighth Amendment issue of the propriety of the prosecutor's argument, which Petitioner contends diminished the jury's responsibility as sentencer, as this issue was not raised below?

II.

Should this Court review the issue of whether the sentencing jury allegedly failed to 'consider' evidence in mitigation as this issue was not raised below?

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BRIEF FOR THE RESPONDENT
IN OPPOSITION

PART ONE
STATEMENT OF THE CASE

Petitioner, William Anthony Lipham, was indicted in Coweta County, Georgia, during the 1986 March Term for the offenses of murder, rape, armed robbery and burglary. (R. 22). Upon a trial by jury, Petitioner was found guilty of the four charges on February 11, 1987. (R. 192). On February 12, 1987, the jury found the existence of four statutory aggravating circumstances and recommended a sentence of death. (R. 201, 203). Specifically, the jury found the existence of three statutory aggravating circumstances under O.C.G.A. § 17-10-30(b)(2), finding Petitioner committed the murder while he was engaged in the commission of the offenses of rape, armed robbery and burglary. The jury also found the existence of the O.C.G.A. § 17-10-30(b)(7) statutory aggravating circumstance, finding that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of

mind. Pursuant to the jury's binding recommendation as to sentence, the trial court sentenced Petitioner to death for murder; the court sentenced Petitioner to life imprisonment for rape, to life imprisonment for armed robbery, and to twenty years imprisonment for the burglary, all sentences to be served consecutively to each other. (R. 203-205).

On direct appeal, the Supreme Court of Georgia affirmed Petitioner's convictions and sentences. Lipham v. State, 257 Ga. 808, ___ S.E.2d ___ (1988). The court specifically affirmed the existence of the three O.C.G.A. § 17-10-30(b)(2) statutory aggravating circumstances but noted that the (b)(7) circumstance should have been returned in the conjunctive rather than the jury's disjunctive finding of torture or depravity of mind. Id. The court affirmed the death sentence on the basis of the remaining statutory aggravating circumstances. Id.

Petitioner now seeks review of the decision of the Supreme Court of Georgia by raising federal constitutional issues which were not presented to nor decided by the state appellate court.

PART TWO

STATEMENT OF THE FACTS

On the afternoon of December 4, 1984, Mrs. Pat Furlow visited the home of her seventy-nine year old mother-in-law, Mrs. Kate Furlow. (T. 146-149). Mrs. Pat Furlow visited her mother-in-law on a regular basis and at trial testified that her mother-in-law was in good health on December 4, 1984, and that her house was neat as usual. (T. 146-149). Mrs. Furlow left the victim's home later that evening. (T. 149).

On the following day, December 5, 1985, family members were unable to get in touch with Mrs. Kate Furlow by telephone. (T. 158-160). Mrs. Furlow's son, Charles Furlow, Jr., became concerned and went to his mother's

home. (T. 161). When Mr. Furlow arrived at his mother's home he discovered a broken window in her front door and did not hear the victim's dog barking. (T. 161). Mrs. Furlow always kept her doors locked when she was in the house alone and her small dog continuously barked when any strangers were around the house. (T. 153, 154). Mr. Furlow looked inside the house and discovered that it had been ransacked. (T. 161). Mr. Furlow left his mother's home and immediately called the police. (T. 162).

The police arrived at Mrs. Furlow's home and discovered Mrs. Furlow in her bedroom with a contact gunshot wound to her head. (T. 228-233). The victim's body was discovered bent over her bed with her legs spread and her body disrobed from the chest down. (T. 232-233). In addition to the house being ransacked the authorities discovered food out on the kitchen table. (T. 233-234).

A neighbor of the victim, Mrs. Sybil Laurent, informed the authorities that at approximately 12:30 p.m. on the morning of December 5, 1985, she had discovered someone standing in her kitchen. (T. 170, 171). Mrs. Laurent testified that she had gone to bed but had gotten back up in response to her dog's barking. (T. 169, 170). Mrs. Laurent stated that she questioned the individual as to what he wanted and the person kept asking for someone by the name of Ronnie. (T. 171, 172). Mrs. Laurent's son then came into the kitchen and asked the individual to leave at which point the person did leave Mrs. Laurent's house. (T. 172). Mrs. Laurent then helped the authorities prepare a composite drawing which was later identified to the authorities as being the Petitioner. (T. 236). At trial Mrs. Laurent identified the Petitioner as the individual who had been in her home on that morning. (T. 174-177). Mrs. Laurent also testified that the Petitioner, when he was in her kitchen, had

consistently ignored her questions but had left when her son had appeared in the kitchen and asked the Petitioner to leave. (T. 177-178).

The authorities subsequently obtained a .25 caliber automatic pistol from the Petitioner's brother which was transported to the State Crime Lab. (T. 237, 238). The Petitioner was arrested by the authorities in Douglasville, Georgia, on January 14, 1986. (T. 239). The Petitioner gave a statement to authorities in which he admitted burglarizing the victim's home but stated that another individual who had been with him at the time was responsible for the rape and murder of the victim. (T. 249-282). The Petitioner specifically informed the authorities that on the evening of December 5, 1985, he had left a friend's house to hitchhike to Savannah, Georgia, to look for a job. (T. 250, 251). The Petitioner stated that he had stopped at the home of Mrs. Laurent but that he was attempting to call a friend of his, a Mr. Ronnie Simon. (T. 250). Petitioner stated that he then left Mrs. Laurent's house and went back to the highway to hitchhike. (T. 251). At that point, an individual picked him up and asked him if he was interested in making some quick money. (T. 251). The Petitioner and the individual then went to the victim's home, and the other individual broke in through the front door. (T. 251). The Petitioner admitted that he then went through the housed ransacking it and looking for items to steal and stated that while he was in the course of eating some food in the kitchen he heard a gunshot in the bedroom. (T. 252). Petitioner testified that the other individual then came out of the bedroom, killed the victim's dog and that both he and the other individual then left the house. (T. 252). Petitioner testified that the other individual then gave him a .25 caliber automatic and told him that "I didn't use this one." (T. 255). The

Petitioner admitted taking a ring and some coins from the victim's house. (T. 253). The Petitioner further admitted pawning the ring and the coins and then leaving the state to go to Florida. (T. 255-257). In his statement the Petitioner did not identify the other individual who was allegedly involved. (T. 282).

Mr. Ronnie Simon testified that the Petitioner, on the night of December 4, 1985, had come by his trailer and had asked Mr. Simon to drive him around to look for two black individuals in a Lincoln automobile. (T. 189-191). While driving around the Petitioner had asked Mr. Simon to drop him off at a point near the victim's home. (T. 192). Mr. Simon then dropped the Petitioner off and later saw the Petitioner on the morning of December 5, 1985, and that at that time the Petitioner had with him some coins and some jewelry. (T. 195). The Petitioner also had with him a .25 caliber automatic pistol which the Petitioner generally carried most of the time. (T. 195-197).

A Ms. Susan Hardy, who lived with Ronnie Simon, testified that early on the morning of December 5, 1985, she saw the Petitioner in Mr. Simon's trailer. (T. 204-207). At that time, th Petitioner had a small bag with him which contained some change, some costume jewelry and a gun. (T. 208). Ms. Hardy testified that the Petitioner stated, "Not bad for a night's work or less than an hour." (T. 208).

An autopsy performed on the victim disclosed that the victim had suffered a pressed contact wound to the left temple. (T. 285-286). The bullet had traveled through the victim's brain from left to right and the victim had died as a result of the gunshot wound. (T. 287). The autopsy also disclosed a large amount of fluid in the victim's vagina; however, the fluid was not positively identified as being seminal fluid. (T. 288-292). The medical examiner did testify at trial, however, that he

believed that the victim had been engaged in intercourse based upon the large amount of fluid in the vagina, the position of the victim's body and the fact that the victim's panties and pajama bottoms were around her left ankle at the time of her death. (T. 288-292).

The State Crime Lab also determined that a pubic hair found on the victim was consistent with the Petitioner's pubic hair. (T. 302-304). The Crime Lab also determined that the bullet which had killed the victim had been fired from the Petitioner's .25 caliber automatic pistol and that a cartridge found on the victim's bed had also been ejected from the Petitioner's gun. (T. 333-336).

Prior to leaving the state after the murder, the Petitioner had in fact attempted to pawn a ring and coins which he had taken from the victim's home. (T. 151, 152, 182, 183, 217-221). The state also established that after the murder the Petitioner attempted to sell the .25 caliber automatic pistol used to kill the victim. (T. 223-226).

The Petitioner took the stand in his own defense and testified consistent with the prior statement which he had given authorities. However, the Petitioner testified at trial that the individual who had actually raped and killed the victim was a Mr. Ricky McCoon. (T. 360-372). The Petitioner testified that on the afternoon of December 4, 1985, he had met Mr. McCoon at a bar in LaGrange and that he and Mr. McCoon discussed going to Savannah that night for the purpose of finding jobs. (T. 360, 361). The Petitioner then met Mr. McCoon later that night at a highway near the victim's house, after being dropped off by Mr. Ronnie Simon. (T. 361-365). The Petitioner and Mr. McCoon then discussed breaking into some homes in order to get money to live on while they were in Savannah looking for a job. (T. 367). After first attempting to break into the home of Mrs. Laurent, the Petitioner

testified that he and Mr. McCoon went to the victim's house and at that point Mr. McCoon broke in through the front door. (T. 369). Petitioner testified that Mr. McCoon assaulted the victim and that he, the Petitioner, went through the house looking for items to steal. (T. 369, 370). Petitioner testified that Mr. McCoon then shot the victim and stabbed her dog and that he and Mr. McCoon left the house and that he, the Petitioner, went back to Ron Simon's trailer. (T. 372-374). The Petitioner tesified that he had not informed the authorities of Mr. McCoon's identity because it was his belief that Mr. McCoon had been murdered and he thought the authorities would blame him for Mr. McCoon's murder. (T. 376-379).

On February 11, 1987, the jury found the defendant guilty of murder, rape, armed robbery and burglary. (T. 467, 468). Following a sentencing hearing the jury recommended a sentence of death, finding beyond a reasonable doubt that the offense of murder had been committed in the commission of the rape of the victim, that the murder had been committed while the Petitioner was engaged in the commission of armed robbery, that the murder had been committed while the Petitioner was engaged in the commission of the burglarly of the home of the victim and that the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind on the part of the Petitioner. (T. 542, 543). The trial court, on February 12, 1987, sentenced the Petitioner to death for the murder, to life in prison for the charge of rape, to life in prison for the charge of armed robbery, and to twenty years in prison for the charge of burglary, all sentences to be served consecutively. (T. 548-550).

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. AS THE EIGHTH AMENDMENT ISSUE REGARDING THE PROSECUTOR'S CLOSING ARGUMENT WAS NOT RAISED BELOW, THIS COURT SHOULD DECLINE TO CONSIDER THIS ISSUE.

In his first issue before this Court, Petitioner has complained of a portion of the prosecutor's argument, contending that it had the effect of diluting the sentencing jury's sense of responsibility and ultimately violated the Eighth Amendment under Caldwell v. Mississippi, 472 U.S. 320 (1985). A review of the brief filed on Petitioner's behalf on direct appeal (which is attached as Respondent's Exhibit A) shows that the specific portion of the prosecutor's argument now raised by Petitioner was not even challenged as error on direct appeal. See Respondent's Exhibit A, pp. 22-23. Moreover, a review of the enumeration of error attacking the propriety of the prosecutor's argument shows that any claim of error was raised as a matter of state law and there was no mention whatsoever of any Eighth Amendment or Caldwell issue. Thus, this Court should decline to review this issue as the federal question was neither raised below nor considered by the state appellate court.

Specifically, on Petitioner's direct appeal he challenged as error the following portion of the prosecutor's argument:

> Forgive him. I'll say to you, that's fine, but you don't have that right. I'll tell you who has that right to forgive. Kate Furlow has the right to forgive him. God has the right to forgive him. You don't.

(Trial Transcript 519; Respondent's Exhibit No. A, p. 22). Petitioner argued on appeal that the remark by the prosecutor

was improper because the jury could impose a life sentence despite finding the existence of any statutory aggravating circumstances. Id. Petitioner cited cases from the Georgia Supreme Court contending that the remark was error under state law. Id. at 22-23. Petitioner never contended that this or any other portion of the prosecutor's argument violated Caldwell. Id. The court decided this issue as a matter of state law. Lipham v. State, 257 Ga. at 812(6).

In the petition before this Court, Petitioner has complained of a different portion of the prosecutor's argument to contend that it diluted the jury's sense of responsibility under the Eighth Amendment and under Caldwell v. Mississippi, supra. Specifically, Petitioner complains before this Court of the following portion of the argument:

> And this is where, as the Judge said, you make the decision as to the punishment. But how did we get to right here? You got here because the district attorney, that's me, as the agent of the State made the decision to seek the death penalty in this case. Not any of you all but by law the only person who can do that. So you didn't bring us here. No one else did. That was my decision and that's why you can choose not to impose the death penalty if you want to, for any reason or no reason whatsoever. But that decision seeking the death penalty was already made. So don't feel like it is your and have it weigh too heavily on you because that was my decision.

(Trial Transcript 479). A review of Petitioner's direct appeal brief shows that this portion of the argument was not challenged as error nor was any Eighth Amendment or Caldwell issue raised. (Respondent's Exhibit No. A, pp. 22-23). Not

only was there no Eighth Amendment issue raised below, but the underlying portion of the prosecutor's argument allegedly giving rise to the Caldwell issue was not even raised nor decided on appeal. Thus, this issue presents nothing for review as it is well settled that this Court will not decide federal constitutional issues raised in this Court for the first time on review of a state court's decision. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); Moore v. Illinois, 408 U.S. 786 (1972). This Court should decline to grant certiorari to consider this issue which was not raised below.

II. THIS COURT SHOULD DECLINE TO REVIEW PETITIONER'S CLAIM THAT THE SENTENCER FAILED TO CONSIDER MITIGATING EVIDENCE AS THIS ISSUE WAS NOT RAISED BELOW.

In his second certiorari question before this Court, Petitioner contends that the sentencing jury failed to "consider" evidence in mitigation so that his death sentence violates the Eighth and Fourteenth Amendments. Specifically, Petitioner contends that because he presented allegedly extensive evidence to the sentencing jury and the jury only deliberated as to sentence for approximately two hours, the jury must have failed to "consider" evidence in mitigation and has asked this Court to grant certiorari on what "consider" means. Again, this is an issue which was not even raised as error below. Thus, this Court should decline to consider this issue raised for the first time in the instant petition.

As shown in the attached brief, Petitioner raised as error on direct appeal claims that (1) the trial court impermissibly entered the attorney/client relationship by designating lead counsel; (2) the trial court erred in failing to direct a verdict of acquittal; (3) the trial court erred in failing to grant a change of venue; (4) the trial court erred in denying Petitioner's motion to sever the counts in the indictment; (5) the trial court erred in concluding the grand and traverse jury lists were constitutionally composed; and (6) the trial court erred in failing to declare a mistrial at sentencing based upon a specific portion of the prosecutor's argument. (Respondent's Exhibit No. A, p. 2). A perusal of this brief shows that at no time does Petitioner raise as error any claim that the sentencing jury simply did not deliberate long enough or fail to consider his evidence in mitigation prior to imposing a death sentence. Thus, not only was no Eighth or Fourteenth Amendment issue raised, but the underlying claim of error was

not even presented to the state appellate court. Petitioner has failed to show that any federal question was presented to and wrongly decided by the Georgia Supreme Court as to this issue. Thus, this Court should decline to grant certiorari as to this issue.

Respondent notes that Petitioner attempts to "bootstrap" a federal question by noting that part of the duty of the Supreme Court of Georgia on direct appeal is to conduct a proportionality review. Respondent notes, however, that this proportionality review is a function of Georgia's death penalty statute. Specifically, O.C.G.A. § 17-10-35(c)(3) provides that with regard to sentence, the Georgia Supreme Court shall determine whether the sentence of death "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Respondent acknowledges that in this case the state appellate court discharged its duty under the state statutory scheme to conduct a proportionality review, but the court did not conduct any such review under any Eighth Amendment claim. No where was any Eighth or Fourteenth Amendment issue presented to the state appellate court, nor was Petitioner's underlying claim of error about any failure to consider mitigating evidence even raised. Thus, for this additional reason, Respondent submits that this Court should decline to grant certiorari as to this issue. Cardinale v. Louisiana, supra; Moore v. Illinois, supra.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that the federal questions presented to this Court for review were never presented to the court below and, further, the decision sought to be reviewed is demonstrably in accord with any applicable decisions of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, PAULA K. SMITH, Attorney of Record for the Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition by depositing a copy of same in the United States mail, with sufficient postage affixed on and addressed to:

Ursula Bentele
250 Jeralemon Street
Brooklyn, New York 11201

This 20th day of June, 1988.

Paula K. Smith
PAULA K. SMITH
Assistant Attorney General

SUPREME COURT OF THE UNITED STATES

WILLIAM ANTHONY LIPHAM *v.* GEORGIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 87-6987. Decided October 3, 1988

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting from denial of certiorari.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for writ of certiorari and vacate the death sentence in this case. But even if I did not hold this view, I would still grant the petition and vacate the death sentence. Imposing the death penalty on petitioner is squarely inconsistent with this Court's decision in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), where we held constitutionally unacceptable precisely the sorts of jury arguments deployed by the Georgia prosecutor here.

Petitioner was convicted of murder, rape, armed robbery and burglary, and was sentenced to death for the murder. In his opening statement at the sentencing phase, the prosecutor told the jury it had reached the phase of the proceedings where "you make the decision as to the punishment." But then he continued:

> "But how did we get to right here? You got here because the district attorney, that's me, as the agent of the State, made the decision to seek the death penalty in this case. Not any of you all but by law the only person who can do that. So you didn't bring us here. No one else did. That was my decision and that's why you can chose not to impose the death penalty if you want to, for any

> reason or no reason whatsoever. But that decision seeking the death penalty was already made. *So don't feel like it is yours and have it weigh too heavily on you because that was my decision.*" (emphasis added)

In his closing remarks, the prosecutor again informed the jury that "[y]ou are simply one more step in the procedure." He concluded by asserting that by comparison with the victim's suffering, the jury's decision was easy: "To infer or to interfere with justice by saying that your verdict of a proper punishment for William Anthony Lipham is only a life sentence is a joke. A very sad joke."

Allowing petitioner's death sentence to stand cannot possibly be squared with *Caldwell*. In that case, we overturned the death sentence in a case in which the prosecutor had noted to the jury that "the decision you render is automatically reviewable by the Supreme Court." We stated there "that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U. S., at 329. The rationale for that holding was that jurors charged with deciding whether capital punishment should be imposed should recognize that theirs is a "truly awesome responsibility" and "act with due regard for the consequences of their decision . . . ." *Id.*, at 329–330 (quoting *McGautha* v. *California*, 402 U. S. 183, 208 (1971)). Dissipating this all-important sense of responsibility, we wrote, could easily result in the jury's deciding to "'send a message' of extreme disapproval for the defendant's acts" without ever having determined that a death sentence was in order. *Id.*, at 331–32.

The prosecutor's statement here—admonishing the jurors not to "feel like it is your [decision]" and urging them not to "have it weigh to heavily on you because that was my decision"—is designed for only one reason: to dissipate the jury's sense of personal responsibility for this most awesome

of decisions. *See, e. g., Tucker* v. *Kemp*, 802 F. 2d 1293 (11th Cir. 1986) (en banc), *cert. denied*, 107 S. Ct. 1359 (1987) (concluding that a "prosecutorial expertise" argument was impermissible under *Caldwell* where the prosecutor suggested that others, including the prosecutor and the police, bore partial responsibility for imposition of the death penalty).

Nor am I persuaded by the State's argument that petitioner is barred on direct appeal from raising his *Caldwell* claim either because of his failure to object at trial or because of his failure to object with more with specificity on appeal below. In sanctioning the prosecutor's statement that deciding whether to execute petitioner shouldn't "weigh heavily on you," the judge committed what can only be deemed a plain error. And in his brief to the Georgia Supreme Court, petitioner—though not complaining specifically that *Caldwell* had been violated—sought reversal generally because of the "inflammatory and prejudicial" argumentation of the prosecutor, a description which richly applies to the remarks quoted above.

I therefore dissent.